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Gun-jumping (Competition Law)

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CONTENTS

ABSTRACT

Premerger coordination between undertakings (so-called “gun-jumping”) is one of the basic principles of ex ante merger control, because it guarantees its enforceability. Knowing the exact boundaries of this prohibition is crucial to merging undertakings, because their behavior before achieving the merger is determined by the clear approach of competition authorities to gun-jumping. This submitted diploma thesis endeavors to analyze the legal framework and practice on gun-jumping violations in the competition law of the European Union, to identify practical problems connected to its application and offer their solutions. Also, this diploma thesis aims to address the possibilities of prevention and sanctions connected to gun-jumping violation.

The majority of competition authorities carry out their supervision and control ex ante and suspend the execution of the notified transaction until it is authorized. However, the parties face difficulties as a result of this suspensive effect. The parties have a legitimate interest in engaging in types of coordination that would not be expected outside of a transaction. The purchaser will normally wish that the target is not depreciated during the suspensive period, and both parties will want to put in place preparatory measures in order to be ready at the time of authorization and thus deliver the expected collaboration as soon as possible. However, usually, the coordination of the companies that comes as a result of the concentration contrasts Competition Law as such. In order to ensure tthat the integrity of the transaction is maintained the parties will have to include mechanisms that will limit the autonomy of the target regarding its management and may therefore grant the acquirer the opportunity to exercise control over the counterparty. Sometimes it is also difficult to distinguish the preparation for the upcoming transaction.

Recent case law shows, however, that European Competition Authorities are more interested in the compliance of the companies with procedural rules. One of these rules is for example the obligation to notify the Authorities for an upcoming concentration/transaction as well as to wait until you carry out the notified transaction until the approval of the competent Authorities. The breach of this so-called suspension obligation is called gun-jumping and it is essential in order for the parties to understand and distinguish between lawful coordination and early implementation of the transaction.

On the other hand, the parties will most likely want to ensure that the restriction on the management is strictly essential for the maintenance of the transactions integrity and that the Authorities will be able to show understanding so that the purchaser will prevent any risky decision making etc. of the target that could affect the future transaction. The parties must also avoid any preparatory measures that would lead them to anticipate the transaction's expected effects. The question put to the Court of Justice about the scope of the obligation to suspend raises a significant stake in this regard.
The line between lawful coordination and early implementation is blurred, and future clarifications from the Commission and the Court are awaited. As the decision-making practice on gun-jumping at the European level is being developed, it is critical that the supervisory authorities demonstrate rationality.

CHAPTER ONE

Introduction

1. Definition

The expression ‘‘gun-jumping’’ is not clearly defined in either EU or US competition law. Usually, gun-jumping refers to the partial or complete implementation of a merger or acquisition earlier than permitted under applicable merger control law. In a broader sense, gun-jumping may also refer to restrictive agreements or practices between companies that are considering an acquisition, if those agreements or practices would be unlawful in any other circumstances.[1] In the context of merger control rules, gun-jumping may be defined as a prohibition of premerger coordination between undertakings. Such a practice is commonly prohibited by the competition law.

The term is utilized to show circumvention of the strategy and the arrangement of preventive control fixations. Such circumvention might be affected either by the unintended or intentional non-warning by the parties involved due to the fact that such notification is mandatory. Or on the other hand, by the early execution of a merger that has not yet been approved by the competent Authority (standstill obligation).

Firstly, it is important to define what gun-jumping means. As mentioned in the introduction, gun-jumping may be shortly defined as a prohibition of premerger coordination between undertakings. As simple as it might sound, such a definition is very vague. Thus, in order to fully understand the concept of gun-jumping, an analysis of its purpose is needed.

Gun-jumping rules are connected to the so-called ex ante merger control regime. If a merger is subjected to notification and clearance by a competition authority, it is only natural to assume that such a merger cannot be implemented before the clearance decision is furnished. The whole purpose of having an ex ante merger control in combination with an ex post regulation of competition behavior (i.e. prohibited agreements between undertakings, abuses of dominant position or distortions of competition by public authority, if relevant) is to maintain the essential characteristics of competition which are needed for the proper functioning of competitive and undistorted markets.

Building on this ground, gun-jumping is rightfully one of the basic principles of the European merger control regime. The key assumption behind a properly functioning ex ante control lies in the fact that in the course of an ex ante assessment of the effects of a merger on the market by a competition authority, the market situation should not be affected by the (prematurely implemented)

[1] MODRALL AND CIULLO: GUN-JUMPING AND EU MERGER CONTROL: [2003] E.C.L.R.

merger. In other words, an implementation of a merger before its clearance by a competition authority violates the very purpose of an ex ante merger control regime.

Therefore, gun-jumping is inherently connected to the very objectives of merger control regime, which are fluid and may differ among individual jurisdictions. General questions related to the applicable merger control regime are viewed preliminary to the assessment of the gun-jumping violation.[2] Therefore, any amendments of merger control rules may significantly influence the concept of gun-jumping.

Notwithstanding, gun-jumping is a very important topic for all undertakings, who are active in the mergers and acquisitions area. Since the number of mergers and acquisitions globally grows, gun-jumping may play a significant role in the merger control area. The danger of high fines for newly merged entities can be seen as the main incentive for undertakings to attempt to understand the differentiation between the allowed and prohibited steps during the merger process and take adequate precautions. Moreover, gun-jumping, as a competition law concept, connects almost all subsystems of commercial law. Various overlaps can be recognized in the area of corporate rules (question of control in connection with concrete powers of corporation bodies) or provisions on obligations (M&A contracts, related documents, and transaction conditions).

2. Purpose

As mentioned above "gun-jumping" is the prohibition of early coordination of undertakings before they are notified to the competent Competition Authority[3].

The rationale behind the mandatory notification prior to the implementation of the merger is to ensure that the parties, which usually are competing companies, remain independent entities in the market for as long as it takes the competent Authorities to consider whether or not to give permission to a merger. The prohibition on implementation stems directly from the concept of the prudential control of concentrations referred to in Greek Law as well as European Legislation. It is the legal consequence of a concentration that is obligatory to be notified at an early stage.[4]

This ensures that in the meantime mergers will not have a negative effect on the structures of each market, since the "competitive status quo" remains unchanged for as long as the Commission (or the national competition authority concerned) assesses the (anti-)competitive effects of the transaction. If a transaction raises competition concerns, then corrective measures may be imposed, or ex ante prohibited. This regulation not only excludes anti-competitive effects from the beginning, but also prevents the realization of irreversible assets and commercial transactions, as well as the exchange of sensitive commercial information between competitors. The law considers

[2] See judgement of the Regional Court in Brno of 26 June 2014, BEST, a.s., Ref. No. 29 Af 64/2012-147, para 7

[3] Lapresta, A. (2019) "Gun jumping is an enforcement priority for EU competition authorities", Financer Worldwide [online]. Available at: https://www.financierworldwide.com/gun-jumping-is-an-enforcement-priority-for-eucompetitionauthorities#.XX_FXCgzaUk

[4] Marinos, M. (2010) "Prohibition of the implementation of the concentration within the meaning of article 44 of Law 703/1977 and exchange of information", CJEU 12/2010, page. 1270

the holding of such a concentration, before the decision of the competent authority, to be potentially dangerous and on this ground prohibits actions that consolidate this situation.

The two provisions-obligations enshrine separate legal principles. They therefore play an inseparable role in the Commission's merger control. On the one hand, the **notification obligation** is the means of bringing to light the existence of a proposed and potential transaction through a formal notification to the Commission. a concentration after the conclusion of the agreement, but before its implementation. The provision of mandatory notification by the Regulation ensures the Commission's ability to identify and assess concentrations (at least those with a Community dimension). On the other hand, the **standstill obligation** prevents mergers from having a detrimental impact on the competitive structure of the market pending the outcome of the Commission's assessment and reduces the risk of a concentration being thwarting if it ultimately does not receive approval.[5] In other words, the standstill obligation essentially achieves the distribution to the undertakings concerned of the financial burden of delaying a concentration until the completion of the assessment by the competition authority, as well as of the economic risk involved in its necessary - where appropriate - dissolution in the event of an illegal early.[6] That obligation therefore goes beyond the obligation to notify by safeguarding effective competition in the internal market pending the implementation of the agreement.[7]

If a concentration is subject to notification and prior authorization from a competition authority, it is natural to assume that such a merger cannot take place before a relevant approval has been granted. The rationale behind an *ex ante* merger control combined with an *ex post* regulation of competitive behavior, such as prohibition agreements between undertakings which have the effect of distorting competition or of abusing dominant position are really essential when it comes to Competition Law.[8]

3. Legal Framework

3.1. Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation)

According to article 3(1) of the Merger Regulation the Community merger control rules apply to concentrations' which satisfy the maximum turnover thresholds as laid down in the Regulation. The general rule is that a concentration which has a Community dimension must be notified to the Commission and is prohibited from being applied until it has been declared compatible with the internal market within the framework of the Regulation.

Article 4, paragraph 1 of the Merger Regulation states that: "*Concentrations with a Community dimension defined in this Regulation shall be notified to the Commission prior to their implementation and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest. Notification may also be made where the*

[5] OECD, (2018) 'Suspensory Effects on Merger Notifications and Gun Jumping- Note by the European Union' OECD [online]. Available at: https://one.oecd.org/document/DAF/COMP/WD(2018)95/en/pdf, page. 3
[6] Judgment of 31 May 2018, Ernst & Young, C-633/16, EU:C:2018:371, par. 35
[7] Altice case, par. 37-41
[8] Altice case, par. 37-41

undertakings concerned demonstrate to the Commission a good faith intention to conclude an agreement or, in the case of a public bid, where they have publicly announced an intention to make such a bid, provided that the intended agreement or bid would result in a concentration with a Community dimension. For the purposes of this Regulation, the term "notified concentration" shall also cover intended concentrations notified pursuant to the second subparagraph. For the purposes of paragraphs 4 and 5 of this Article, the term "concentration" includes intended concentrations within the meaning of the second subparagraph[9]. Furthermore, according to Article 7 paragraph 1 of the Merger Regulation: *"A concentration with a Community dimension as defined in Article 1, or which is to be examined by the Commission pursuant to Article 4(5), shall not be implemented either before its notification or until it has been declared compatible with the common market pursuant to a decision under Articles 6(1)(b), 8(1) or 8(2), or on the basis of a presumption according to Article 10(6)."* The standstill obligation also applies to concentrations which do not have a Community dimension but are examined by the Commission in accordance with Art. 4 para. 5 of the Regulation.

The EU legislation therefore provides for an ex ante evaluation system that states that concentrations with a community dimension may not be performed before they are notified to the competent authorities and approved as compatible with the Internal Market. According to Article 8 para. 5 of the Regulation: "*The Commission may take interim measures appropriate to restore or maintain conditions of effective competition where a concentration:* ***(a) has been implemented in contravention of Article 7, and a decision as to the compatibility of the concentration with the common market has not yet been taken;*** *(b) has been implemented in contravention of a condition attached to a decision under Article 6(1)(b) or paragraph 2 of this Article; (c) has already been implemented and is declared incompatible with the common market"* while according to para. 4*: "Where the Commission finds that a concentration: (a) has already been implemented and that concentration has been declared incompatible with the common market, or (b) has been implemented in contravention of a condition attached to a decision taken under paragraph 2, which has found that, in the absence of the condition, the concentration would fulfil the criterion laid down in Article 2(3) or, in the cases referred to in Article 2(4), would not fulfil the criteria laid down in Article 81(3) of the Treaty, the Commission may: - require the undertakings concerned to*

[9] Article 1 of the EC Merger Regulation: 1. Without prejudice to Article 4(5) and Article 22, this Regulation shall apply to all concentrations with a Community dimension as defined in this Article.
2. A concentration has a Community dimension where:
(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5000 million; and
(b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million,
unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.
3. A concentration that does not meet the thresholds laid down in paragraph 2 has a Community dimension where:
(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2500 million;
(b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million;
(c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and
(d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million,
unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

dissolve the concentration, in particular through the dissolution of the merger or the disposal of all the shares or assets acquired, so as to restore the situation prevailing prior to the implementation of the concentration; in circumstances where restoration of the situation prevailing before the implementation of the concentration is not possible through dissolution of the concentration, the Commission may take any other measure appropriate to achieve such restoration as far as possible, - order any other appropriate measure to ensure that the undertakings concerned dissolve the concentration or take other restorative measures as required in its decision."

According to Article 14 in the event that the parties involved in the transaction have breached the Regulation the Commission may, regardless of the outcome of the assessment, impose fines and they may face financial penalties up to 10% of their total turnover. Regulation (EEC) No 2988/74 of the Council of 26 November 1974 concerns limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition.

3.2. Law 3959/2011 - "Protection of Free Competition"

Greek Law 3959/2011 on the "Protection of Free Competition" (hereinafter "Competition Act" or "CA") is fully aligned with EU competition law rules. Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU") are directly applicable in Greece in cases with an EU dimension, whereas Articles 1 and 2 of the Greek Competition Act are equivalent provisions for national cases. **Merger control provisions in the Competition Act follow the principles of the EU Merger Regulation**. The Competition Act also contains the main procedural and implementation rules. The Greek legislation also consists of several Decisions that have been issued by the Hellenic Commission on Competition.

Regarding the provision on Mergers and Concentrations, Law 3959/2011 offers a broad system of prudential control of certain undertaking concentrations, which is carried out prior to their completion. In many cases, the concentration must be notified to the Competition Commission so that the latter can determine whether the concentration is significantly restricted by exercising ex ante control[10].

According to article 5 para. 2 of Law 3959/2011 (and the corresponding article 3 par. 1 b of Regulation 139/2004 on the control of concentrations between undertakings, a concentration is considered to exist when there is a permanent change of control from the acquisition, from one or more persons who already control at least one undertaking or from one or more undertakings directly or indirectly through the purchase of securities or control assets in all or parts of one or more other undertakings.[11]

[10] Greek Decision by the Hellenic Commission on Competition.

[11] Article 5 para. 2 of Law 3959/2011: *"A concentration shall be deemed to arise where a change of control on a lasting basis results from: a) the merger by any means of two or more previously independent undertakings or parts of undertakings or b) the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings."*

The general wording of the aforementioned article is further clarified in paragraphs 3 and 4 of the same article which define the concept of control in the above provisions. According to them, control is understood as the possibility of decisively influencing the activity of an undertaking. With regard to the means of acquiring control, it is stipulated that this may result from the acquisition of ownership rights in all or part of its assets and/or from rights or contracts which enable the acquiring member to exercise a decisive influence over the composition, meetings, or decisions of the organs of an undertaking, taking into account the relevant factual or legal circumstances[12].

Article 6 para 1. of Law 3959/2011 refers to the obligation for prior notification of concentrations of undertakings and clearly states that: *"All concentrations of undertakings shall be notified to the Competition Commission within thirty (30) days of the conclusion of the agreement or the announcement of the bid or the acquisition of a controlling interest, where turnover by all undertakings in a concentration within the meaning of Article 10 totals at least EUR one hundred and fifty million (150,000,000) on the global market and each of at least two of the undertakings involved generate turnover totalling over EUR fifteen million (15,000,000) on the Greek market".* Furthermore, this Article is also supplemented by Article 9 para. 1 of the same Law regarding the Suspension of implementation of concentration that states: *"Without prejudice to the provisions of paragraphs 2 and 3, the implementation of a concentration shall be prohibited until a decision has been issued under Article 8(2), (3) or (6). This prohibition shall also apply to concentrations which were not notified in accordance with Article 6(1). In the event of culpable infringement of this prohibition, the Competition Commission shall impose a fine of at least EUR thirty thousand (30,000), capped at ten per cent (10%) of aggregate turnover, as calculated in accordance with Article 10, on persons who fail in their duty of notification in accordance with Article 6(3). In fixing the fine, regard shall be had in particular to the economic power of the undertakings, the number of the relative markets affected by the concentration and the competitive conditions prevailing in these, as well as to the estimated impact of the concentration on competition".*

As stated above, in the event that the parties have failed to notify properly the concentration within the time frame set out, the Hellenic Commission may of course impose sanctions between EUR 30 thousand and 10% of the total turnover of the undertaking concerned regarding on the impact that the transaction has on competition.

[12] Article 5 para. 3 and para. 4 of Law 3959/2011: *"3. For the purposes of the application of the present law, control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by: a) ownership or the right to use all or part of the assets of the undertaking; b) rights or contracts which confer decisive influence on the composition, meetings, or decisions of the bodies of an undertaking. 4. Control is acquired by person(s) or undertakings which: a) are holders of the rights or entitled to rights under the contracts concerned or b) while not being holders of such rights or entitled to rights under such contracts, have the power to exercise the rights deriving therefrom."*

CHAPTER TWO

What is "gun-jumping"?

1. Gun-jumping and its basic forms

The European legislation, and other international sources recognize two distinct violations. The first is the companies' failure to comply with the merger's procedural gun-jumping obligation, and the second is the early implementation of a notified concentration, either before it is notified to the Commission or before it has been approved by the Commission. .[13]

Two basic forms of gun-jumping as an enforceable protection of ex ante merger control regime may be distinguished and are recognized by the relevant literature[14] and other international sources[15]:

- Substantive gun-jumping (regulated by a stand-still obligation) as the coordination of competition conducts before clearance by a competition authority comprising various forms of conduct; and
- Procedural gun-jumping (regulated by an obligation to notify) as the failure to notify a merger which is subjected to notification to a competition authority.

This difference is by itself controversial, because if an undertaking fails to notify the merger before its implementation, it inevitably will also implement the merger before clearance by a competition authority.

It could be argued that where there is an appropriate substantive prohibition, a procedural prohibition is unnecessary. As a result, it is up to each jurisdiction's merger control policy to determine whether both obligations are required for the prohibition of gun-jumping or if the suspension obligation suffices. Of course, one could criticize jurisdictions where only failure to notify a concentration is prohibited and punished (e.g., Italy and Latvia), claiming that serious issues arise in the context of ex ante merger control. Once a concentration has been notified, there are only a few options for preventing it from being carried out before the Commission has approved it. Not finally authorized by the Authority or approval of a conditional concentration cannot be considered sufficient protection equivalent to ex ante control, because once a merger is materialized, it is extremely difficult to segregate ex post the merged undertakings.

Furthermore, such concentration may have already had an impact on competition in the relevant market. If a Competition Authority wishes to penalize such a merger, it may be possible to prohibit it. However, in such a case, the ex ante control regime appears to fail. In other words, maintaining effective competition is "exchanged" for penal sanctions that distort it. To summarize, the prohibition on meaningful gun-jumping is critical to the interoperability of ex ante merger control

[13] Faull, J. και Nikplay, A. (2014) The EU Law of Competition, 3rd edn. Oxford: Oxford University Press, page 630
[14] FAULL, J., NIKPAY, A. and TAYLOR, D. *The EU law of competition*. 3rd ed. Oxford: Oxford University Press, 2014. ISBN 978-0-19-966509-9. p. 630
[15] DIONNET, S., GIROUX, P. Gun jumping. *Skadden, Arps, Slate, Meagher & Flom* [online]. January 2017 [accessed 8 April 2018]

and cannot be completely replaced by either a ban on procedural gun-jumping either by ex post control in the form of prohibiting deals or by imposing penalties.

The preceding also applies to jurisdictions where notification is required. In Sweden, if no prior authorization for a merger has been granted, the courts or the Swedish Competition Authority (Konkurrensverket) can only enforce the sale of a portion of the company or the assets already purchased[16]. However, if a merger is completed without incident prior to the license, the above divestment becomes problematic because it will undoubtedly have an impact on the market.

Historically, the European Commission and European Union courts have distinguished between the two infringements mentioned above, even imposing separate fines for each of them. The General Court's decision T-704/14 Marine Harvest/Morpol[17,] which outlines both types of gun-jumping, is an example. On the one hand, procedural gun-jumping entails a company's obligation to take a specific action specified in the notification of the respective concentration, whereas essential gun-jumping entails a company's obligation to remain dormant, i.e., not to take any action before obtaining the approval by the Commission;[18] In the context of the nature of the participants' behavior in a concentration, these are two distinct obligations. The Commission confirmed in Altice that Article 4 p. 1 and Article 7 para. 1 of the Regulation preserve two distinct legal principles.[19] On the other hand, the Commission has explicitly admitted that a breach of the notification obligation automatically results in a breach of the standstill obligation, which could imply that the above distinction is unnecessary because the practical impact of the above differentiation is minimal: in both arrangements a merger without the prior permission of the Commission (or the national competition authority for the jurisdictions where it is provided for the notification) will be deemed to infringe at least the obligation to refrain from doing so.

As already mentioned, the Regulation imposes a positive obligation - concerning the procedure before the Commission - to notify before the implementation of the proposed concentration and a negative obligation not to implement it either before its liquidation or before the expiry of the relevant administrative period. These obligations aim at maintaining the existing conditions of competition until the Commission is able to assess the likely outcome of the transaction. Therefore, the parties are obliged, before the winding up the concentration, behaving independently on the market and avoiding any coordination of their commercial behavior.

The EC Merger Regulation does not define specific practices involving gun-jumping infringements but provides for a general prohibition that no concentration should take place before notification of or before the Commission's authorization. In other words, the Regulation simply

[16] Davis, J. and Others (2017) Merger Control 2018, UK: Getting the deal through

[17] Judgment of the General Court (Fifth Chamber) of 26 October 2017, T-704/14 Marine Harvest/Morpol, EU:T:2017:753 In: *CURIA* [legal IS]. European Union Publication Office [accessed 25 February 2018]. Available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=196102&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=252886

[18] Judgment of the General Court (Fifth Chamber) of 26 October 2017, T-704/14 Marine Harvest/Morpol, EU:T:2017:753 In: *CURIA* [legal IS]. European Union Publication Office [accessed 25 February 2018]. Available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=196102&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=252886

[19] Decision of the European Commission of 24 April 2018, M.7993 | Acquisition of PT Portugal by Altice

sets out a general clause, which does not contain any typical case and no typical example of gun-jumping, unlike that it happens in art. 101 and 102 TFEU.

1.1. Failure to notify the transaction

The obligation to notify a concentration is an integral part of the ex ante merger control regime. The simplest form of gun-jumping is the one in which the parties to a merger with a community dimension did not notify the transaction to Commission [20].

There are several reasons that could justify such an omission. Mandatory notification is often overlooked or simply forgotten when the participants in a concentration do not exercise due care for the procedure imposed from competition law. It is also not uncommon for errors in the calculation of threshold values or in the determination of transactions constituting concentrations with a Community dimension and therefore must be to be notified shall result in the parties being unable to determine that there is indeed an obligation to notify. Finally, it is very likely that non-disclosure is intentional in order to speed up the merger process or to avoid competition control. This usually occurs only when it is expected that the Authority will never be informed or take any action to impose sanctions or when it is considered to lack effective enforcement powers.

Higher fines started making an entrance later on when the Commission imposed fines of EUR 20 million on Electrabel in 2009 and Marine Harvest in 2014. These figures showed for the first time the Commission's increased interest in punishing companies for gun-jumping offences. In most of the cases not notified, the Commission did not find it appropriate to be responsible, but rather a misunderstanding as to whether the merger notification requirements were applied to transaction[21]. For example, an enterprise may find it difficult to understand how the control element is evaluated or how the turnover should be calculated or of the market share[22]. In Torras/Sarrio[23], the Commission did not impose a fine because the parties had difficulty in calculating the turnover of the holding company who participated in the transaction and therefore misjudged whether the Regulation should be applied.

In the case of the sale of a business or of an asset deal or shares (share deal), the conclusion of the contractual obligations does not lead to the realization of the concentration, since the legal transaction by which the concentration takes place remains, but it triggers the obligation to notify the Commission. The legal act of foreclosure is subject to the suspensive condition of the approval of the competition authority. However, the distinction between a contractual act and a divestment

[20] Modrall, J. (2017) 'The EU gets tough on gun jumping', in Competition World / Third Edition 2017 [online] page.9.
[21] 2003/754/EC: Commission Decision of 26 June 2002 declaring a merger to be compatible with the common market and the EEA Agreement (Case COMP/M.2650 — Haniel/Cementbouw/JV para. 28-32 where the parties thought that the merger was part of another transaction already approved by the national authority and therefore there was no obligation to notify to the Commission. Decision *RWE Energy/Mitgas para. 7 where the purchaser wrongfully thought that no notification was required.*
[22] See For example, the € 76,000 fine imposed by the Spanish Competition Commission on Bergé in 2010, when the Authority received a complaint that the concentration was within the thresholds set for mandatory notification, was overturned by the Spanish Court in decision no. 3736/2012 Bergé v Comisión Nacional de la Competencia, of 28 September 2012.
[23] COMMISSION DECISION of 24.02.1992 declaring a concentration to be compatible with the common market (Case No IV/M.166 - TORRAS / SARRIO) according to Council Regulation (EEC) No 4064/89

transaction, however useful it may be, does not always help under the economic consideration of competition law, always having and given that it is unknown in most eu legal orders[24].

1.2. Implementing the transaction before receiving the Commission's approval

The distinction between violations related to non-compliance with the notification obligation and the implementation of a transaction before acquiring the approval from the competent authorities is not always clear as the very concept of "implementation" is quite vague. The prohibition on carrying out before the approval has been given by the competent authority, seeks to preserve, the status quo of the competition in general on the market and especially between the undertakings concerned. This objective defines the normative scope of the concept of fulfillment of the concentration.[25]

In both forms of gun-jumping, the question of whether the concentration has been affected before notification or approval is converted into whether the buyer exercised control over the target company. The answer to this question, however, is not easy, as what action constitutes an "exercise of control" is a complex issue, since in many cases the fulfillment of a concentration is not the result of a share redemption or a transfer of assets between the parties, but of a series of actions leading to the operational management of the target business long before final approval. The difficulties that arise usually have to do with the lawful behavior at the stage of legal control, in the provisions allowed in the contracts for the purchase and sale for protection of the assets and value of the target company in general, for the planning of the post-merger period and the parameters of the overall relationship between the parties during the suspension period[26].

Moreover, in the context of the literature on competition, the standstill obligation has been described as the prohibition of the merger of the parties through "coordination of their commercial activities and their commercial practice, price coordination, production or research strategies; and/or through participation in joint marketing or advertising", implying that such conduct may constitute a breach of the suspension order as well as of Article 101 TFEU[27].[28]. In fact, in the context of Art. 101 para. 1 TFEU, such practices are treated as anti-competitive per se, i.e., without the need to make a further analysis as to whether or not they have a negative impact on the competition[29]. For this reason, it is common to adopt procedures to ensure that this exchange is

[24] See Marinos M. (2010), page 1272
[25] See Marinos M. (2010), page 1271
[26] Giner, M. (2017) "Gun jumping in France: how clean is your team", *in Competition World/Norton Rose Fulbright* [online]. Available at: https://www.nortonrosefulbright.com/en/knowledge/publications/181ac679/gun-jumping-in-france-how-clean-is-yourteam, page. 6
[27] Jones, A./ Brenda (2016) S. *EU Competition Law*, 6nd edn. Oxford: Oxford University Press, page. 1126. Bailey, D./John, L. (2018) *Bellamy & Child: European Union Law of Competition, 8th edn. Oxford: Oxford University Press, 2018, pages. 663-665*
[28] Hull, D. και Gordley C. (2018) as above page 8
[29] Issues of anti-monopoly legislation under no. 101 par. 1 TFEU may also arise during the negotiation phase, although infringements during this period do not fall within the prohibition of gun-jumping. These risks can be particularly serious, where negotiations are lengthy or are interrupted or restarted after an agreement failed the first time. The parties must receive precautions, including the execution of a confidentiality agreement that restricts both information exchanged as well as their use by the recipient. While the same behavior can is a violation of one or both sets of rules, the characterization of a particular action may affect both the procedures followed and the penalties that may be imposed.

restricted between a small group of people who is subject to very strict confidentiality obligations ("clean team arrangements")[30].

More recently, in June 2019, the Commission imposed a fine of 28 million euros, this time on Canon for the early implementation of the acquisition of Toshiba Medical Systems (TMSC)[31]. At the same time, in the re-judging of all these decisions, but also earlier in the period of inaction of the Commission, the national competition authorities dealt with a number of cases in the which they have found infringements of the standstill obligation.

2. Acquisition of control

According to article 5 para. 2 of Law 3959/2011 (and the corresponding article 3 par. 1 b of Regulation 139/2004 on the control of concentrations between undertakings, a concentration is considered to exist when there is a permanent change of control from the acquisition, from one or more persons who already control at least one undertaking or from one or more undertakings directly or indirectly through the purchase of securities or control assets in all or parts of one or more other undertakings.

The general wording of the aforementioned article is further clarified in paragraphs 3 and 4 of the same article which define the concept of control in the above provisions. According to them, control is understood as the possibility of decisively influencing the activity of an undertaking. With regard to the means of acquiring control, it is stipulated that this may result from the acquisition of ownership rights in all or part of its assets and/or from rights or contracts which enable the acquiring member to exercise a decisive influence over the composition, meetings or decisions of the organs of an undertaking, taking into account the relevant factual or legal circumstances.

Control is defined by Article 3(2) of the Merger Regulation as the possibility of exercising decisive influence on an undertaking. It is therefore not necessary to show that the decisive influence is or will be actually exercised; however, the possibility of exercising that influence must be effective.[32]

Article 3(2) further provides that the possibility of exercising decisive influence on an undertaking can exist on the basis of rights, contracts, or any other means, either separately or in combination, and having regard to the considerations of fact and law involved. These criteria include considerations of both law and fact and a concentration therefore may occur on a legal or a de facto basis. It may take the forms of sole or joint control and extends to the whole or parts of one or more undertakings (cf. Article 3(1)(b)). The acquisition of control over the assets can only be considered a concentration if those assets form the whole or part of an undertaking, i.e., a business with a presence on the market, whose turnover can be clearly determined.

[30] Deportere, F. and Motta, G as above.
[31] European Commission Press Release 27 June 2019 Mergers: Commission fines Canon €28 million for partially implementing its acquisition of Toshiba Medical Systems Corporation before notification and merger control approval
[32] CFI, Case T-282/02 Cementbouw v Commission (not yet reported), paragraph 58 (judgment of 23 February 2006).

Whether an operation gives rise to an acquisition of control therefore depends on a number of legal and/or factual elements. The most common means for the acquisition of control is the acquisition of shares, possibly combined with a shareholders' agreement[33] in cases of joint control, or the acquisition of assets.

2.1. Acquisition of control through acquisition of shares

According to Article 3 para. 1 of the Regulation *"A concentration shall be deemed to arise where a change of control on a lasting basis results from: (a) the merger of two or more previously independent undertakings or parts of undertakings, or (b) the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings."* According to para. 2 of the same Article which can be interpreted as the protection of the former paragraph states that*: 2. Control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by: (a) ownership or the right to use all or part of the assets of an undertaking; (b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.* This means that companies involved in a transaction should take into account that even the ability to exert a decisive influence on the target company is equivalent to gun-jumping[34].

In the event that the acquisition of a majority of the shares or shares with the voting rights has not taken place, the analysis of whether the possibility exists from a decision-making influence is difficult to deal with as it is necessary to determine whether the minority shareholding leads to de facto control. Factors to be considered include: the dispersion of the remaining shares, whether the other shareholders are likely to support or oppose the largest shareholders in the majority and if the other large shareholders have structural, financial, or family links with the largest minority shareholders[35].

There are several cases where the Commission has refrained from imposing fines on parties who did not notify a transaction for having misjudgment of the change of control. In Hutchison/RCPM/ECT, the Commission found that the parties had carried out gun-jumping by implementing a merger which they did not notify because they classified the transaction as wrong. As a cooperative agreement and not as a consortium, which means that it does not fall within the scope of the Regulation. The Commission concluded that although each party had control of 35%

[33] A shareholders' agreement, also called a stockholders' agreement, is an arrangement among shareholders that describes how a company should be operated and outlines shareholders' rights and obligations. The agreement also includes information on the management of the company and privileges and protection of shareholders.

[34] According to the Competition Commission, she can find out that the merger took place even before formal transfer of ownership of the shares and their delivery to the acquiring company, provided that has in fact the ability to exercise control over the acquired company. (Decision no. 536 / IV / 2012)

[35] Gutermuth, A., Ersbøll, N.C. Feinstein, D. Bernstein, M. Hedge, J., Simphal, C. (2018) 'Managing Gun-Jumping and Related Antitrust Risks in M&A Transactions', *Arnold & Porter* [online], Available at: https://www.arnoldporter.com/en, page. 9

of the voting rights of the target company, the control was common as the powerful interests that all sides had, would not allow them to vote against each other[36].

The Commission in some cases has concluded that, since the holder of the remaining shares enjoyed certain exclusion rights, he also had de facto joint control of the target company, which meant that the transaction was indeed a merger that should have been notified because it entailed a change in the control regime[37]. It is also noted in some cases that even though the parties technically may have committed a gun-jumping infringement by implementing the mergers prior to their notification, due to incorrect assessment the Commission authorized them to notify the transactions retrospectively without imposing any penalty on them.

It should be noted that the Commission has issued a White Paper and launched a consultation on the possibility of extending the Merger Regulation to cover and the minority shares that do not involve control where there is a "competitive important link", which closed in October 2014. Since then, Commissioner Vestager has recognized that "these issues need to be looked at further" and the work has been put on hold. Businesses should be informed and are aware of any future changes (although no changes are expected in the Regulation in the short or long term).

2.2. Acquisition of control through assets

The Merger Regulation provides in Article 3(1)(b), (2) that the object of control can be one or more, or also parts of, undertakings which constitute legal entities, or the assets of such entities, or only some of these assets.[38] The acquisition of control over assets can only be considered a concentration if those assets constitute the whole or a part of an undertaking, i.e., a business with a market presence, to which a market turnover can be clearly attributed. The transfer of the client base of a business can be deemed a concentration.[39] A transaction confined to intangible assets such as brands, patents or copyrights may also be considered to be a concentration if they are the basis for an existing economic activity and the assignment of these intellectual property rights seems sufficient for also transferring the turnover-generating activity. The grant or transfer of licenses, without additional assets, will normally only bring about a concentration if they are exclusive at least in a certain territory; for non-exclusive licenses it can be excluded that they may constitute on their own a business to which a market turnover is attached. If the assets transferred do not allow the purchaser to at least develop a market access, it is likely that they will be used only for providing services to the outsourcing customer. In such circumstances, the transaction will not result in a lasting change in the market structure and the outsourcing contract is again similar to a service contract.

According to the European Commission, the subject of the audit in this case may be all or only part of those assets, if they are a business of which a clear market turnover is defined. Based on the practice of the European Commission, the above condition of setting up a business activity with an independent presence in the market and an identifiable turnover is met by rule assets or

[36] COMMISSION DECISION of 3rd of July 2001 COMP/J.V.55 – *Hutchison/RCP/ECT,* para. 1
[37] Decision *RWE Energy/Mitgas*, para. 7
[38] Case IV/M.286 - Zürich/MMI, of 2 April 1993.
[39] Case COMP/M.2857 – ECS/IEH of 23 December 2002.

combinations of assets that contain the necessary components of a business or businesses, such as production facilities, trademarks, licenses and guarantees relating to the operation of assets, know-how, intangible assets, goodwill, staff employed, market access. Transactions limited to the transfer of one of the assets of a legal person/entity only, without this being accompanied by the transfer in addition to assets or other rights, have exceptionally been considered to constitute concentrations within the meaning of Regulation 139/2004[40].

Furthermore, in cases of acquisition of ownership of a part of the assets of an undertaking, as is the case here, the relevant element is the identification of that part of the assets which is important for its acquisition to constitute a concentration of undertakings. In assessing the value of the party, account must be taken not only of quantitative criteria but also of the qualitative importance of acquiring it in place of the part/ buyer in the market. Thus, a part can be considered as significant, not only when it is sufficiently high in relation to the seller's total property, assets such as stock, assets, mobility equipment, lists of suppliers, supply contracts, goodwill, employment contracts, but also when it has, regardless of its size, a qualitative importance, i.e. it is able to change the position of the buyer on the market[41].

In 2008, the German Federal Office for Cartels (FCO) imposed a fine of EUR 4 million to Mars company for not notifying the acquisition of nutro products[42]. The two companies had entered into an agreement abolishing Nutro's distribution rights in Germany. FCO found that because Mars had acquired property rights, such as trademark rights as well as production plants, and it was able to compete successfully on the German market even if the distribution rights had been abolished. This was the first time that the ban on gun-jumping applied to two non-German companies and the first deviation from the previous more relaxed approach of the FCO. This was followed by a fine of EUR 4 million to Druck and Verlagshaus Frankfurtam Main GmbH, while in 2011, FCO imposed a smaller fine on the agricultural cooperative ZG Raffenstein[43] for failure to notify the acquisition of a warehouse in 2009, as it considered that it was a key business asset, to which it can be attributed that the whole year is the turnover.

3. Restriction on the management autonomy of the target limited to the preservation of the integrity of the transaction

Even if the decision of the competition authorities once the operation has been notified is locked within strict time limits, the anticipation for the companies may however, be extremely long. According to statistics provided on March 23, 2017 during the Meeting of the Authority (“Les Rendez-vous de l'Autorité) "Gun-jumping: the limits not to be crossed",[44], the procedure before the European Commission lasts from 2 to 7 months if we consider the pre-notification phase and then a phase 1 can last up to 11.3 months if a phase 2 is started. This period may be extended if the carrying out of the operation is also subject to the authorization of an authority of a third State for which means that the examination would not be locked up within such strict time limits as those

[40] Decision 655/2018, para. 62
[41] Decision 655/2018, para. 63
[42] Decision FCO *Mars/Nutro*, της 15 December 2008
[43] FCO *ZG Raffenstein*, της 28th of January 2011
[44] Antoine Winckler, Associé du cabinet Cleary Gottlieb Steen & Hamilton (Bruxelles).

laid down in Article 10 of the Regulation No. 139/2004. The parties must ensure that all authorisations are obtained, as shown in the *Cisco / Technicolor1*[45] case in the framework within which the parties were condemned by the Brazilian Competition Authority (the "CADE") for not having waited its green light when they had already obtained five other authorizations.

This period that separates the signing of the protocol of accord / contract / SPA ("the signing") from the actual transfer of ownership of the target assets from the seller to the purchaser ("the closing") raises practical difficulties for the parties.[46] The latter have agreed on a transfer price for the target, set at the end of an assessment of the value of the target carried out on the date to which the acquisition contract was concluded.[47] However, the target may be confronted, during the suspensive period, with the taking of decisions likely to have an impact on its value and the scope of its activities, even though the interests of the seller and the purchaser are no longer necessarily convergent.

In order to preserve the integrity of some assets the purchaser wishes therefore to insert in the the contract and maintain a general commitment of the seller regarding the day to day management of the target in the in the normal course of business.[48]. Nevertheless like the Authority recalled in the decision Altice, « The formulation of the decision suggests that it excludes from the control field of the purchaser, as well as operational activities, all strategic decisions, whether under the Memorandum of Understanding or independently of it »[49], and from whereas constitute one offence from gun-jumping.

The question that arises is therefore that of knowing to what extent the purchaser can limit the management of the target without acquiring the possibility to exert a decisive influence on its activities which may constitute a *gun-jumping* offence. According to Umberto Berkani, general rapporteur of the Competition Authority, the test to be carried out is that of a balancing of the interests of the parties to the operation. The extent to which limitations on target management are necessary for the case to defend its interests (i.e. preserving the value and scope of the target) without prejudice of the target's independence[50]

If it is legitimate for the party to wish to limit the management of the target, it is crucial that the influence be limited to decisions, exceptional or structuring that could have an impact on the value or scope of activity of the target. The parties must, however, ensure that the mechanisms put in place to enable the applicant to protect the value of the target are not not likely to allow the exercice of a determined influence on the activity of the target.

[45] Decision of CADE OF 20 Jnauary 2016
[46] APDC, Observations précitées à la note 13, §19, p. 3
[47] Ibid.
[48] In practice, the distinction between prohibiting the seller from taking a
decision relating to the management of the target and prior authorization of the purchaser is not a great relevance. Most often, the parties negotiate a waiver of this prohibition and the seller can consult the buyer in order to be able to derogate from this contractual obligation.
[49] DC ADLC n° 16-D-24, page. 199
[50] Presentation of the Altice case at the conference organized by the Competition Authority, Les Rendez-vous de l'Autorité "Gun Jumping Authority: the limits not to be crossed", March 23, 2017

3.1. Significant part in the target's activity and usual decisions in the context of day-to-day management: prevent any influence of the purchaser

In so far as the parties to a concentration must remain independent, any intervention by the purchaser which would lead the target to change its behaviour on the market during the suspensive period is to be excluded. Thus, the purchaser cannot influence what would usually be a matter of day-to-day management of the target. However, defining what falls within the normal course of business may present difficulties. The question which should therefore be asked is whether the intervention of the purchaser operates on a significant part of the the effectiveness of the target.

3.1.1. The usual decisions with regard to the day-to-day management of the target

The obligation for the seller to manage the target as a "good father" implies that it must continue to be managed on the basis of strategic plans and budgets that are in place at the time the *due diligence* was done. Conversely, the client cannot intervene in "decisions usually subject to the approval of the Board of Directors, such as, for example, the vote of the budget, strategic plan, investments or the appointment of the framework"[51]. In addition, the purchaser cannot intervene in decisions relating to the management of the target such as its commercial policy[52].

In this respect, the facts in the *Altice* case were particularly stating: the intervention of a leader of the case that led the target to suspend in such a way as to premature its promotional offers of access very high-speed interne[53]. The Commission also seems to have found facts similar to the situation against Altice in the context of the acquisition of PT Portugal and which are specified in the press release dated April 24, 2018 that Altice "did *indeed* exert a decisive influence on some Aspects some activities from PT Portugal by example in the giving some instructions on the manner from lead one campaign from marketing»[54].

It is also interesting to note that the Authority of Brazilian competition, which recognises in its guidelines for the nalysis of the early realization of mergers, that it would be impossible to list all the clauses of the protocols of the agreement / SPA / contract which could be anti-competitive because there are a "countless of contractual clauses which may organise an operation', and refered to any clause explicitly as being highly capable of characterizing an early implementation to ny clause which would allow 'direct intervention by a party in the commercial strategy of a party such as, for example, in decisions relating to price, customers, price or sales policy, marketing strategies»[55].

Thus, any influence of the client on key competition parameters of the target such as its pricing policy (ability to set and negotiate its prices), sales, promotion, is to be excluded, whether it results

[51] DC ADLC 16-D-24, page. 197
[52] *Ibid.*
[53] *Ibid.*
[54] European Commission, IP/18/3522 supra note 3.
[55] CADE, Guidelines for the analysis of previous consummation of merger transactions: http://en.cade.gov.br/topics/publications/guidelines/guideline-gun-jumping.pdf).

from the protocols of accord /SPA/ contract or not. As Michael C. Naughton, now a partner at Weil (New York) stated, any restriction on the target's freedom of management relating to its ability on policy should be avoided, even if this restriction was simposed only on the guard of decisions or conduct which would be in the normal course of business.[56]

More generally, any decision that would be included in the strategic plans and budgets in place at the time when the transaction operates and the valuation of the target has been assessed ('due *diligence* phase') cannot be prejudiced by the purchaser. The parties must therefore be vigilant when drafting the SPA so as not to allow the member to exercise its influence on decisions that would normally fall under the day-to-day management of the target. In the context of the *Altice* case, the Authority considered that the provisions relating to the management of the target during the interim period in the agreement with OTL did not respect this principle. The Authority stated that "Numericable has obtained under the memorandum of understanding a right of control over various decisions operations of the OTL group from the suspension period ”28 in sofar as the clauses “expressly provided for a strong limitation of the commercial freedom of the OTL group during the suspension period”.

The drafting of the protocols of the agreement / SPA / contract and the rights conferred on Altice in the context of the *Altice/PT Portugal* case were also at issue. The press release states that Altice had "the legal right to exert a decisive influence on PT Portugal" in particular through certain provisions of the purchase agreement that gave it a veto over decisions concerning the ordinary activity of the target[57]. The publication of the decision is expected. It will indicate the position that the Commission intends to adopt with regard to the target management clauses set out in the Protocol of accord / SPA / contract[58].

In order to ensure that the influence of the purchaser would not increase on what would fall within the day-to-day management of the target and it is often recommended that the parties limit the management of the target only to sufficiently high thresholds. However, thresholds set at a high level of materiality will not, in themselves, be sufficient to systematically protect the parties against the risk of a gun-jumping offence.

3.1.2. Decisions relating to a significant part of the target's activities and conditioning its competitive capacity

The scope of transactions that fall under the "normal course of business" varies according to the facts and markets considered. The limits of management autonomy provided for in the SPAs must therefore be designed with regard to these specificities so as not to capture acts of day-to-day

[56] Michael C. NAUGHTON, "Gun-Jumping and Premerger Information Exchange: Counseling the Harder Questions", Antitrust Magasine, Vol. 20, n°3, 2006, p. 12 « *restrictions on customer pricing should be avoided, even if they restrict pricing outside the ordinary course* ».
[57] European Commission, IP/18/3522 supra note 3
[58] G. GETEYN, M. READINGS, J. WEBBER, "The EU Commission sends a statement of objections to a company to investigate whether a merger was implemented prior the Commission’s clearance", *eCompetitions*, n° 84212, p.2.

management in the normal course of business.

At first sight, the concern to ensure the value of the target seems to justify the need for the purchaser to submit to its agreement the making of large investments in capital or the signing of a significant supply contract. However, as Michael C. Naughton, 'if competitors in this market usually compete on the basis of such contracts, such a restriction could be problematic'[59]. *SmithfieldFoods Inc.* provides a particularly illustrative example in this regard. Pursuant to the Memorandum of Understanding, Smithfields authorised the signing of multi-year public procurement contracts involving tens of millions of dollars. Although the DOJ did not dispute the significance of these contracts –they involved expenditures of 57 and 67 million of dollars –, he still considered that purchaser (Smithfields) had prematurely acquired control of Prenium Standard (the target) during the suspensive period. As the DOJ points out in its complaint, it is indeed not unusual for the target, given its core business –the processing and packaging of pork –, to sign long-term public contracts involving such a level of expenditure. If this decision does not limit the ability of the customer to protect himself from any behaviour of the target which could affect his budget in excess of what was negotiated during the *due diligence* phase, however, it confirmed that only decisions that come out day-to-day management in the normal course of business may be subject to its agreement.[60]

Thus in order to determine if the purchaser can or not impose such restrictions depends on as Michael C. Naughton said, the answer to the question if those restrictions are likelyto limit the capacity of the target[61]. To answer to this question the parties involved ask usually, especially if the restriction that the purchaser has entered into the protocol of accord / SPA/ contract limits by nater the activities usually exercised by the target. If the answer is positive the parties must wait and suspend their actions or exlude these clauses and decisions from the contracts.

The Competition Authority adopts a similar approach and states that the influence of the heart "must be acquired on a significant part of the the effectiveness of the target, a criterion which will have to be taken into line with the specific characteristics of the sector and the undertakings concerned'[62]. In the specifics, the purchaser has exerted its influence on strategic decisions with regard to the effectiveness of its targets, such as participation in a strategic call for proposals for a project to build and operate a public fibre optic network[63] or the signature of an complement to a major agreement to pool the mobile networks of the target and a competitor.

Conversely, in the event that the intervention of the customer does not cover essential areas of the main activities of the target, thresholds set at a sufficiently high level of materiality will in itself be sufficient not to capture decisions relating to day-to-day management and will make it possible

[59] M. C. NAUGHTON, supra note 27, p. 12
[60] D. L. MEYER, "DOJ Sends Shot Accross Bow on Gun-Jumping", *Mergers & Acquisitions: The Dealermaker's Journal*, March 2010, Vol. 45, N° 3, p. 2.
[61] M. C. NAUGHTON, supra note 27, p. 12
[62] DC ADLC n° 16-D-24, supra note 2, page. 293
[63] *Ibid*

to address the concerns of competition.

However, the target may face many situations during the interim period likely to affect its value and the scope of its activities. However, the protocols of the agreement / SPA / contract can only solve absolutely exceptional situations. These must be drafted in such a way that decisions submitted regarding the control from the purchaser are rare and isolated[64]. In the event that the parties decide to have recourse to clauses limiting management autonomy beyond the situations that could have a significant impact on the value of the target, they "must take into account that they are entering an area that may be of interest to the authorities of control " »[65].

3.2 The difficulties posed by structuring strategic decisions are likely to have an impact on the value of the target

The parties to a transaction must be able to enable the purchaser to decide on the taking of certain strategic decisions or, at least, to have a right to in so far as these decisions would be likely to affect the value of the target. The parties must, however, take a number of precautions to ensure that the purchaser does not have the capacity to exert a decisive influence on the target.

3.2.1 The need for a pragmatic approach by supervisory authorities

As noted by the APDC in its observations, the mere fact that a decision can be considered to fall within the "normal course of business" does not mean that it is not likely to affect the value of the target[66]. Secondly, a restrictive approach where the seller does not have the capacity to consult the purchaser is based on an exceptional outgoing decision of the course of business and which, for that reason, is covered by the principle of interdiction in the agreement would risk having negative consequences on the effectiveness of the target. Such an approach would amount to immobilizing the target at the risk of deteriorating its future value since this "situation of operational paralysis" would be the same as In particular, it would be necessary to seize opportunities which may arise during this transitional period'[67].

This approach is even more dangerous when the competitive situation at the time of *due diligence* evolves and disrupts the strategic plans established on that date. As pointed out by a specialist in mergers and acquisitions at the conference organized by the Authority on gun-jumping[68] , the announcement of a reconciliation of several players in an oligopolistic market in order to induce competitors to adopt aggressive behavior in order to gain market share during the suspension period. Indeed, they will seek to benefit from the fact that the parts are in a way 'not unrealized' during this period, forced to reach the green light of the Authority to be able to benefit from the synergies expected from the operation. These behaviors disrupt what could be understood as "the

[64] APDC, Observations supra note 13, §67, p. 12
[65] R. LIEBESKIND, supra note 6, p. 9
[66] APDC, Observations supra 13, §35, p. 6
[67] *Ibid*
[68] Speech by Marcus Billam, partner of Darrois Villey Maillot Brochier (Paris) during the Meeting of the Authority of March 23, 2017 "Gun-jumping: the limits not to be crossed".

normal course of business" at the time of negotiation and rise to, therefore, management difficulties. The seller, who would risk being held liable, will be reluctant to take a decision that would be affected by the price, while the purchaser takes the risk of exercise an influence deemed decisive in the event that he gives his approval for such a decision. It is therefore essential that the authorities show pragmatism in order to enable the target to seize the opportunities that will allow him to react to changes which may occur once the operation has been announced. This is precisely what the US competition authorities have set out to do. First, they demonstrate pedagogy[69] by explicitly indicating the clauses limiting the management of the target that make it possible to preserve the value of the target without harming the independence of the latter. As part of the *"Computer Associate"*[70], the DOJ noted the target management clauses in the Agreement Protocol in question considered acceptable because they are intended *solely* to prevent the target from some actions that could seriously reduce the value from the target. These clauses included, in particular, restrictions on the freedom of the target of issuing new shares, creating new ones outside the normal course business, modify its organizational documents, encumber or mortgage its intellectual property rights or any other tangible asset outside the ordinary course large capital expenditures.

Second, they attempt to provide analytical tools to the parties. William Blumenthal, then General Counsel of the Federal Trade Commission, took from afar to provide elements of assessment as to the situations in which significant projects that would be in preparation during the suspension period but which will not fully produce their effects until after the closing [71]. To illustrate his point, he refers to the situation where the seller would have considered the construction of a factory before entering into exclusive negotiations with the purchaser. This plant, which would only be effective after *closing,* would amount to creating over capacity if the transaction were to take place. On the contrary, in the event that the operation does not take place and the target's assets are not separated, the seller would not be led to this project, which would then be economically justified. The tension with competition law is clear and this is more if the parties to the operation are in competition. Indeed, in the event that the transaction does not take place, the decision not to complete the construction project will have the effect of reducing the competitiveness of the seller. Should the operation be carried out, this decision will lead to a reduction in the general production capacity in industry. As William Blumenthal points out, 'the question arises as to whether or not the parties can engage in some form of coordination. during the suspensive period in order to decide whether the seller should proceed with the construction or not"[72]. Although it is admitted that the authorities have not been able to develop a systematic grid of analysis which has been set up in this way. in this case, it Insists on the fact that the authorities lead one fine factual analysis.

This analysis leads to the following questions: (i) was the decision not to continue or to postpone the construction project exclusively taken by the seller, has been mandated by the seller or is it an intermediate situation? (ii) what are the expected efficiency gains from the project? (iii) in the

[69] W. BLUMENTHAL, "The Rethoric of Gun-Jumping", Remarks before the Association of Corporate Counsel, Annual Antitrust Seminar of Greater New York Chapter: Key Developments in Antitrust for Corporate Counsel, New York, November 10, 2005, p. 3.
[70] US vs. Computer Associates and Platinum Technology, Complaint for equitable relief and civil penalties, 28 September 2001.
[71] W. BLUMENTHAL, supra note 43, p. 12
[72] *Ibid.*

event that the transaction does not take place, (a) what is the degree of reversibility of the decision not to proceed or to postpone the transaction and (b) to what extent would the seller's competitiveness and the level of competition in the market be affected? (iv) does the project represent a significant change in the effectiveness of the target? if so, was it known or foreseeable to the seller during due diligence.

This list of questions provides useful details as to the elements to be taken into account in the balancing. The prevalence generally accorded to the intensity of competition explains why it will be difficult for the supervisory authorities to recognize the need for coordination of the parties. William Blumenthal assures, however, that "the position of the American authorities is not that of a categorical opposition" and that they are "ready to consider the 'ensemble of factual constancies'[73].

The pragmatism shown by the US authorities contrasts with what emerges from the decision of the Competition Authority in the *Altice case.* The wording of the decision suggests that the scope of the case, in the same way as operational activities, are also all strategic decisions, whether under or independent of the Protocol of accord/ Contract/ SPA[74]. As previously demonstrated, the practice would require a more nuanced statement. The influence of the purchaser or, at the very least, his right to control strategic decisions cannot be excluded in such a way as categorical. Thus, in the light of all these strategic decisions likely to hinder a devaluation of the target, the purchaser could legitimately wish to have an influence or at least one right to look and understand the bigger picture. The tension with the right from the competition for all or some strategic decision is however extremely strong and the competitive risks very important. The parties must therefore do proof of a great vigilance and apply one strict test strict to limit the tense from the influence or of the right to understand the picture and to try to benefit the purchaser only in the measure where that is strictly necessary for the protection of his interest to guarantee the maintenance of the integrity from the target.

3.2.2 Precautions to be taken to ensure that the influence of the purchaser on these decisions does not lead to the early acquisition of control of the target

The purchaser must restrain himself to verifying that the conduct in question clearly does not deviate from what would have been adopted in the context of a good management of the enterprise in the normal course of business. Indeed, as Umberto Berkani pointed out at a conference organized by the Authority on *gun-jumping*, the control of the purchaser on the decisions which could have an impact on the value or scope of the target should be limited to a control of the obvious error of judgment.

Umberto Berkani also pointed out that the test to be carried out in order to determine whether the case has a decisive influence is not that of the type of control (veto) or authorization) but the manner in which the control is carried out. Thus, the applicant must carry out this control with the

[73] W. BLUMENTHAL, supra note 43, p. 13.
[74] DC ADLC n° 16-D-24, supra note 2, page. 196.

sole interest of preserving the value of the target and not the interest of the future merged entity. The influence exerted through this control must therefore be strictly necessary for the objective of preserving the integrity of the assets and the performance of the target.

When the parties activate the mechanisms provided for in the protocols of the agreement / contracts / spas so that the purchaser validates or blocks a decision that the seller would like to take they necessarily exchange information on the basis of which the company can decide. In this respect, concerns have been raised about the wording of certain statements made by the Competition Authority in the *Altice* case. The Authority seems to consider that it is up to companies to "set up a system that *eliminates all communication* between independent companies". Strategic information meaning some Lines directors on the applicability from article 101 of the TFEU. This needs several remarks. These statements principle call for several remarks. First, to have as an analytical framework the cartel law is not satisfactory. Indeed, retain the same conception of what would come under strategic information within the framework of the agreements and within the framework of a merger during the suspensive period does not appear realistic.

The exchange of information between the parties during the suspension period may prove to be reasonable in certain cases, even if the same exchange of information between competitors without intention to merge would be suspect or illegal. Second, the Exclusive use of third parties to assess target information is not practicable. It is indeed sometimes necessary to transmit information to internal people who have the knowledge of the trade. In addition, exclusively clean teams composed of external advisers raise real difficulties related to the problem of the "principal-agent" [75]»: insofar as the know-how is held by people internally, the question arises to what extent the acquirer can delegate to of the outside firms the care and responsibility of pronouncing on the decision in question. For all these reasons, practitioners have worried about the possible implications of the decision on the possibility of including internal persons in the parties to the operation in the clean teams. However, the Authority seems to have removed these doubts and the Commission's press release announcing Altice's conviction for early implementation seems to confirm the possibility of including internal people to the company in the clean-team. She criticizes the fact that Altice exercised a "Decisive influence on certain aspects of PT Portugal's activities by asking and receiving commercially sensitive information about the company outside of any confidentiality agreement".

In any event, as emphasized by Franck Audran, a lawyer specializing in competition from Gide (Paris) "the need for companies involved in a merger to respect a long timeframe for obtaining authorization of an operation, and to continue to act as separate entities by maintaining a impermeability between them as regards the information exchanged, must be materialized by a certain number of precautions " [76]. First, it is recommended for companies to precisely identify the strictly essential information in order to allow the purchaser to decide. The nature of the information as well as its degree of accuracy will have to meet a strict test of proportionality. These should be processed so that they can be presented, as required by the Authority, in a sufficiently aggregated. In addition, it is necessary to provide mechanisms to secure exchanges. In

[75] W. BLUMENTHAL, supra note 43, p. 11, note that Marcus Billam also raised this problem during the Rendez vous of the Authority in March 2017,

[76] F. AUDRAN, "Gun-jumping: l'Autorité française dégaine la première" 1 April 2017

this regard, the clean-teams (secure platform for exchanges), present important guarantees. The people who can be part of it and thus take note of the information must be selected with caution: anyone involved in making day-to-day operational decisions such as those relating to prices, sales or marketing must be excluded [77] To avoid all effect from « spill-over»[78] i.e., dissemination. Internal members present in the clean-teams must be subject to contractual commitments strict such as confidentiality agreements and / or a commitment not to occupy a operational position after being a member of a clean team. For information extremely sensitive, such as participation in calls for tenders or future commercial intentions, even more restrictive mechanisms must be put in place in place. Frank Audran also recommends anticipating any questioning ensuring "the traceability of information obtained and processed by the parties by means of physical or digital preservation processes so that the parties are able to to produce them in the event of control by the competition authorities or to destroy them in the event of failure of the operation "[79].

Although the formulation of the principles identified might have been a cause for concern, there was no doubt that the purchaser had been the recipient of the strategic information without the parties putting in place the necessary safeguards. Numericable indeed had access to extremely sensitive information concerning the costs incurred, the anticipated margins, and the target's strategy as part of a call for tender's strategic project for the construction and operation of a network fiber optic public initiative. Numericable has also replaced SFR for the takeover of OTL even though the acquisition was in the economic interest of SFR regardless of the proposed merger with the purchaser [80]. This decision, to obviously, was not motivated by the concern to preserve the value of the target and has also given rise to the exchange of strategic information on the offer (in particular price deposited by the target for the takeover of OTL and economic and financial analyzes on its valuation). In short, the decision of the Competition Authority relating to the Altice case does not provide useful guidance to companies. It was not in fact, there is no question for the buyer in this case of verifying whether the investment was not disproportionate but to decide instead of the target by projecting in the best interests of the merged entity.

4. Exemptions from the gun-jumping prohibition

A typical feature of competition law is a relatively complicated system of exemptions [81]. Regarding gun-jumping, EU competition law also provides for a number of exemptions from the prohibition of a premature merger implementation. If the exemptions related to other merger control instruments (related to the concept of a concentration itself or referral system [82]) are omitted, two exemptions directly connected to gun-jumping could be described:

- so-called "public bid exemption";[83]

[77] G. GETEYN, M. READINGS, J. WEBBER, supra note 31, p.2
[78] W. BLUMENTHAL, supra note 43, p. 10
[79] F. ANDRAN supra 54, p. 6.
[80] DC ADLC n° 16-D-24, supra note 2, pages 61-69.
[81] For example handbook of the EC which contents all regulations and guidelines related to general block exemption from Article 101 TFEU, see Rules Applicable to Antitrust Enforcement. European Union [online]. 1 July 2013 [accessed 8 May 2018].
[82] Article 22(4) of the ECMR. For interpretation, see e.g., ORTIZ BLANCO; 2013; op. cit., p. 706
[83] See Article 7(2) of the ECMR.

and

- individual exemption from gun-jumping prohibition.[84]

As for the public bid exemption, it concerns public bids or a series of transactions in securities admitted to trading on a market such as a stock exchange, over which control is being acquired.

As for the decision-making practice on the EU level, public bid exemption is assessed in Marine Harvest / Morpol case, which shows that public bid exemption should not cover an acquisition of a significant block of shares from a single seller.[85]

The individual exemption from gun-jumping covers situations, where undertakings file an application for exemption from gun-jumping prohibition on the basis that there is a threat of sustaining considerable damage or any other significant detriment to the undertakings concerned or third parties.[86] However, individual exemption is also not as used in the EU level.[87] At the EU level, merging parties are able to request for a grant of an individual exemption before clearance by the EC,[88].

4.1. Partial conclusion

Two main settings of gun-jumping rules are applied by vast majority of the European jurisdictions:

- substantive gun-jumping prohibition based on a stand-still obligation; or
- substantive gun-jumping prohibition based on a stand-still obligation and complemented with procedural gun-jumping prohibition based on an obligation to notify.

Other settings based only on procedural gun-jumping prohibition also applied among the European jurisdictions. However, such settings are not appropriate within *ex ante* merger control regime based on mandatory notification, since enforceability of such regime is compromised due to lack of substantive gun-jumping prohibition. Substantive gun-jumping prohibition is key element for well-functioning merger control regime.

5. Criteria on assessing gun-jumping violation

[84] See Article 7(3) of the ECMR.

[85] See BREVERN, D., WCISLO, P. Beware of "gun jumping": EU court confirms EUR 20 million fine imposed on Norwegian seafood company. *National Law Forum.* [online]. 31 October 2017 [accessed 21 April 2018].

[86] Article 7(3) of the ECMR. Regarding possible grounds for granting an individual exemption, see KOKKORIS, I. and SHELANSKI, H. A. *EU merger control: a legal and economic analysis.* Oxford: Oxford University Press, 2014. ISBN 978-0-19-964413-1. p. 189-191.

[87] According to the statistics to May 2018, 123 decisions regarding individual exemption have been decided by the EC, see Merger Statistics. *European Union* [online]. May 2017 [accessed 20 June 2018].

[88] See the latest decision of the EC, where it granted the exemption under the condition that the concentration will be notified no later than one month after granting of the exemption, see decision of the EC of 7 December 2017, *Baywa / Clean Energy Trading*, Ref. No. M.8758, para 39.

It is striking that the general criteria on assessing substantive gun-jumping infringements on the EU level have not been provided for by the EU courts until only very recently. On 31 May 2018, the judgement of the CJEU in *Ernst & Young*[89] case laid down general criteria on the assessment of substantive gun-jumping prohibition. Although the ruling may seem vague,[90] competition law practitioners have welcomed the *Ernst & Young* as a useful guidance on the stand-still obligation[91] and as the first piece in the puzzle of what amount to substantive gun-jumping under the ECMR.[92]

In my opinion, *Ernst & Young* case clarified the following problems:

- transactions which are not necessary to achieve a change of control do not fall within the substantive gun-jumping prohibition;

- transactions which may be of an ancillary or preparatory nature to a concentration do not present a direct functional link with implementation; and

- gun-jumping violation is prohibited, irrespective of whether it has produced market effects.

The first and the second point clarify the conditions, which should be observed within an assessment of whether concrete steps in a merger process result in a gun jumping violation. The criterion of necessity of each concrete step and its ancillary or preparatory character both present the key elements within the reasoning on a potential gun-jumping issue. At first glance, these conditions might look vague. However, if they are transformed into the following questions, they offer a useful guide for an assessment gun-jumping on general level:

- Is the transaction/step necessary (i.e. would a control be acquired without an execution of the given transaction/step)?

Is the transaction/step ancillary or preparatory (i.e., is transaction/step just a secondary within a chain of transactions/steps leading to an acquisition of control)? Answering these questions does not bring the final answer on a gun-jumping violation and it also requires a case-by-case analysis. On the other hand, to understand what questions should be asked is a good starting point for the assessment. The separation of gun-jumping violation from its effects on the market, in my opinion, leads to the conclusion that gun-jumping is more of a violation of a formal legal obligation rather than a violation linked to a situation on the market (such as e.g.,

[89] Judgment of 31 May 2018, Ernst & Young, C-633/16, EU:C:2018:371

[90] Ibid., para 62, "*[a]rticle 7(1) of* [ECMR] *must be interpreted as meaning that a concentration is implemented only by a transaction which, in whole or in part, in fact or in law, contributes to the change in control of the target undertaking.*"

[91] WILSON, T. The ECJ provides welcome guidance on the stand-still obligation in mergers. *Kluwe Competition Law Blog*. [online]. 5 June 2018 [accessed 19 June 2018]

[92] NOURRY, A. EU Court of Justice clarifies the EU Merger Regulation prohibition on gun jumping? *Clifford Chance* [online]. 5 June 2018 [accessed 19 June 2018]

abuse of dominant position[93]). This is a very important finding, and it should be taken into account when imposing a sanction corresponding to the gravity of the infringement.

Using the first piece in the puzzle metaphor, I am of the opinion that *Ernst & Young* case indeed presents the first piece of the puzzle, which shows how other pieces could fit into the full image but does not show how these other pieces look like. Therefore, it is anticipated that other pieces will follow

6. Conclusion

In the light of the analysis set out before, the question of when the concentration is 'carried out' within the meaning of the Law is a fundamental issue. The legislative texts do not offer any help, and it is striking that the general criteria for the evaluation of gun-jumping were not provided for by the judicial EU institutions. Given the extent of the term 'implementation' of the concentration, it is clear that the specific cases and circumstances of each merger combined with the overall picture what constitutes a concentration and how a change of control can occur is of great importance in this respect, in order to shedd clear up the admittedly grey 'grey' zone."

The way in which the early implementation of a concentration is now treated and evaluated has changed. In *the Bertelsmann/Kirch/Premiere* case, the Commission emphasised that the release of the decoder was an action directly linked to the impending merger, had substantial consequences in the competition and could hardly be overturned[94] and there was no mention whatsoever of whether there had been a change in control before the approval of the transaction. The recent case-law, however, insisted that the key to evaluation is a change in control and indeed, not just the actual exercise of decisive influence by the buyer in the target business, but also the possibility of this.

In all decisions there seems to be some convergence in the legal scope of the standstill obligation: it should be limited to measures which, in whole or in part, legally or in fact, they **contribute to** changing control of the business. It is not necessary to demonstrate that decisive influence has been exercised and/or that this measure has led to any negative effects on the market. In this sense, the risk of gun-jumping must be taken into account both before the spa is negotiated and signed, so as to avoid acquiring the buyer the possibility of exercising decisive effect on the objective, as well as after signature, on the interaction between the merging parties until the green light is given by the Authority, with a view to avoiding the exercise undue influence on the usual commercial practice of the target.

Despite these clarifications, uncertainty remains as to what is specifically prohibited or permitted under the standstill obligation. For example, it is not clear whether all the individual practices described in *Altice* are classified as gun-jumping, or whether these should be considered together

[93] See Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009/C 45/02)

[94] The same criteria were taken into account by the Swedish Competition Authority in the Ernst & Young case.

for establishing the infringement Although it remains to be seen whether the DG to which Altice appealed agrees with it, it seems convincing that this interpretation it is the right one, because otherwise it would be impossible for the buyer to ensure that the value of his investment is maintained until the liquidation of the transaction.

Moreover, the Commission's decision attributes part of the infringement to the exchange of sensitive information, but does not make it clear whether such an exchange could in itself contribute in a change in control, or whether it should be assessed on the basis of art. 101 TFEU within the meaning of *EY* Decision[95]. In this context, a key question that arises is whether these decisions will affect the way in which any similar cases. In particular, it is not clear whether a 'dual trajectory' may be necessary in cases where different types of behaviour have taken place that have led to a change control and commercial coordination. The CJEU's judgment seems to leave little room for the view that its operative part can be understood as the establishment of a general principle of gun-jumping applied on a single legal basis.

The importance and impact of these two decisions has already been understood. In decision 665/2018, CC based its assessment of whether the companies had been gun-jumping in their operative part and investigated whether it had been carried out either exchange of information between interested parties or if a change in the control had taken place before final approval. According to the CC, in order to establish the early realization, it would have been sufficient for the purchaser to have acquired the possibility of exercising decisive influence. The majority of CC members concluded that no gun-jumping had taken place due to the inclusion in the memorandum of understanding of an explicit clause, in accordance with which the fulfillment of transaction will be subject to the prior approval of CC and the supplemental contract, which was signed the day after the spa's signature. According to CC, there was doubt as to whether Masoutis acquired the ability to exercise control, since it did not exercise in practice any management acts or voting rights at the shareholders' meetings of the acquired entity and therefore the early implementation of the concentration is not considered likely. However, two of the members of the EA disagreed, considering that certain actions, such as, for e.g., the access of the acquiring entity to the management of the target through the submission to it of the resignation of the members of the Board of Directors of the objective and access to the financial and other information constituted acts of transfer of management rights and ownership to Masoutis, enabling them to control the target enterprise.

In any event, it is a given that the parties to the merger remain subject to their general obligations under competition law, in particular the prohibitions against anticompetitive agreements and abuses of dominant positions. Therefore, although pre-trade actions that do not contribute to a change of control do not constitute gun-jumping, companies are still running through the risk of infringing general competition law. This is particularly the case where the parties to the merger are actual or potential competitors.[96]

[95] Depoortere, F. and Motta, G,.o.π. , page. 10

[96] Cave, B. (2018) "European Court of Justice Clarifies Scope of Gun Jumping Prohibition", *Lexology* [online], Available at: https://www.lexology.com/library/detail.aspx?g=49baa855-74ac-47ed-800c-823d1f5e62da

CHAPTER THREE

THE AFTERMATH – PROCEDURAL ISSUES - FINES & PREVENTIVE MEASURES

1. Procedural issues – Ability of companies to request guidance prior to notification

The Commission has published the guide "Best Practices on the conduct of EC merger control proceedings" ('Best Practices on Community Merger Control') aimed at the provision of guidance to the undertakings concerned on the normal conduct of the control procedures. This is a step towards encouraging the creation of a spirit of cooperation and trying to reconcile the needs and interests of both sides (ex ante merger control v. business activity). 'Best Practices' seek to improve the effectiveness of the Commission's research and evaluation by ensuring a high degree of transparency, as well as to reduce of the process making the interval as productive as possible for all[97] stakeholders.

It is a fact that the period before the notification of a proposed merger is extremely important for the overall process. For its part, the Commission considers that it is useful to have contacts before notification with interested parties, whether problematic or not. The parties may therefore request, if they so wish, to discuss the concentration which they intend to notify informally and confidentially prior to notification. These contacts give on the one hand, the parties the opportunity to seek clarification on jurisdictional issues and other legal issues that may give rise to concerns, and on the other hand they help the Commission to prepare and identify potential competition problems at an early stage.

This opportunity for the parties to seek the Commission's guidance is extremely important. As mentioned above, several times the merging companies do not notify because they want to deceive the Commission, but because they did not understand that some from the actions they took they constituted concentration or did not calculate the thresholds correctly. Especially in cases where control is acquired through assets or de facto through the acquisition of a minority, in action of the parties to seek the assistance of the Commission may to be fatal.

For example, taking into account the above, it is safe to state that control can be exercised even if less than 50% of the shares entitled to vote are acquired; just as owning more than 50% of the shares in a company does not necessarily imply the acquisition of control in case there are certain restrictions on the right to vote. In other words, there is no prescribed minimum holding above which minority holdings will necessarily fall under the European Merger Regulation[98]. Thus, there may be a joint venture in which only some of the shareholders have joint control, while others are considered merely passive minority investors (despite the fact that only some of the shareholders have joint control, while others are considered merely passive minority investors (despite the fact that that they hold minority rights). In this case there may be perfectly sound business reasons why the acquisition is structured in this way, reasons that have nothing to do with avoiding merger

[97] European Commission (2004). *DG Competition Best Practices on the conduct of EC merger control proceedings*. [Online] Available at: https://ec.europa.eu/competition/mergers/legislation/proceedings.pdf

[98] Miller, S. R.; Raven, M. E.; Went, D., (2012) "Antitrust Concerns From Partial Ownership Interest Acquisitions: New Developments in the European Union and United States", *CPI Antitrust Chronicle* (1), page. 3.

control, for example some investors with particular experience or a larger investment, and as therefore, role in management.

To sum up, the concept of a horizontal influence in the context of minority shareholdings is important because the European Commission applies the "one stop shop" principle according to the Regulation 139/2004. This means that acquisitions of minority shareholdings are only "notified" if they incorporate decisive influence and are thus controlled only if the minority shareholdings and the rights attaching to them go beyond the concept of mere protection of an investment, in other words, the minority shareholding must be able to determine the strategic commercial behavior of Objective[99]. Where the acquisition of minority shareholdings does not provide the opportunity to exercise of decisive influence on the target undertaking, this transaction will fall within the scope of the competition rules contained in the European Merger Regulation, as a stand-alone acquisition.

In such cases it would therefore be preferable for the parties to contact the Commission as early as possible with a view to either explaining to the Commission all these operational reasons. which lead to the structure of the transaction in a specific way but also to clarify whether any of the actions they intend to take constitutes an acquisition of control and thus triggers the obligation to disclose. The possibility of consulting the Commission and agreeing together on how best to continue the process not only reduces the chances of businesses to commit procedural misconduct in the future, but at the same time it is an indication that they are aware of the rules and that they intend to do everything possible precaution to observe them with due diligence. In several of its decisions, the CC has taken into account that the parties have not sought to circumvent effective control of the concentration, nor to conceal the concentration took place, but on the contrary, in good time they took all the necessary steps to notify it[100], while on the contrary it has welcomed companies because they ought to know the procedure and take all the necessary measures but in different if[101].

Discussions prior to the notification shall be held with strict confidence. Mutual issues can only be achieved in a constructive manner if all possible issues are discussed in an environment of trust and cooperation. These discussions should primarily involve the legal advisers of the companies, who have the appropriate knowledge of the relevant markets and who can present and document in detail the business rationale for the transaction.

2. Carve out

Cross-border corporate transactions often require mergers to be approved by several national competition authorities in order to be able to take place. This can cause delays. If the parties work on a strict schedule and the necessary approval from only one last jurisdiction is pending, then the carve-out of that jurisdiction can be a choice designed to bring about the performance of the rest of the transactions. While competition authorities are generally critical of such solutions, abolition

[99] Drauz, G., Mavroghenis, S., Ashall, S. (2012) Recent Developments in EU Merger Control, *Journal of European Competition Law & Practice*, 2012, Vol. 3, No. 1, page. 58.
[100] Decision of the Competition Authority of 8th January 2014, para. 47
[101] Decision 658/2018, para. 18

may be a real alternative in certain cases where the parties are in a hurry and want the concentration to be completed as soon as possible.

There are cases where the parties await the approval of their merger even from a jurisdiction that is of little economic importance to the entire transaction. If, for example, a company that operates almost exclusively in the USA is acquired and the merger is subject to the American control regime, but also activates the obligation in Germany, the entire transaction can take place after obtaining approval from both competent authorities. Under the regime of globalization, such delays are very likely to occur frequently, since there is a possibility that the realization of a merger may need to be approved. even from ten different jurisdictions. The ever-increasing integration of world markets is one of the main reasons why the competent authorities have reservations as to how and whether negative effects on the domestic market in question could be avoided in the respective domestic market in the case where a transaction takes place abroad[102].

In some cases, making at least part of the transaction before/up to a certain date can become vital for a number of reasons. For example, the parties may face significant financial losses if the realization is delayed due to a loss of profits. In these circumstances, the parties may endeavor to shorten the procedure by temporarily cutting off from the total trade of that party in the country which it has not yet given the green light. Thus, the parts of the transaction for which no approval is required or for which the approval has already been given can be implemented seamlessly. Unfortunately, few jurisdictions have legal provisions for the carve-out. In addition, there are a very small number of published decisions dealing with this issue. Since the carve-out is not envisaged or accepted by the competition authority concerned, it is treated as a (partial) implementation of the proposed transaction. and, therefore, as a violation of the suspension obligation: that is, it amounts to gun-jumping. Depending on the circumstances of each case, there are the following alternatives to Carve-Out. The standstill obligation does not apply to mere preparatory measures under the CJEU. The parties may therefore take legal steps to prepare for the immediate implementation of the merger as soon as approval has been given. In addition, if there are likely to be any negative consequences due to the delay, many jurisdictions provide for exemptions from the standstill obligation, especially if suspension threatens irreparable harm to the parties, e.g., if the target business is on the verge of bankruptcy. However, the economic damage must be exceptional and exceed the consequences that are caused by the simple delay of transaction[103]. In some cases, it may be more promising for parties to request their own quicker approval from the competent authority if they are able to substantiate negative economic consequences but not to such an extent that they constitute exceptional circumstances.

The Commission is adopting a restraint attitude towards the Carve-Outs: exemptions from the suspension obligation are only given by a formal decision of the Commission. Previous decisions show that the Commission assesses Carve-Outs requests on the basis of the criteria it uses to grant

[102] This was exactly the case in the German Mars case mentioned above, where the manufacturer Nutro food from the US was acquired by the German Mars. Approval from the US had been given, but the process in Austria and Germany took longer. Mars so decided to "Cut off" the German and Austrian activities of Nutro and carry out the rest of the transaction. The FCO described the behavior as gun-jumping and imposed a fine, basing its decision on acquisition by Mars of trademark rights and Nutro facilities in other countries and considering that these assets were enough to secure Mars competitive advantage in the German market.

[103] Decision of the European Commission of 11 February 2011, COMP / M.5969-SCJ / Sara Lee, para.34

an exemption in cases of exceptional economic loss. In the context of the acquisition of Dyno by Orica in 2006, the Commission approved Carve-Out, justifying the decision in view of the extremely serious consequences expected if the transaction was further deprived. In addition, the Commission considered that cutting off the non-EU activity of the target company would not hinder measures to eliminate the problems of competition in Europe[104].

In contrast, in 2011, the Commission rejected an application lodged by SC Johnson for the acquisition of the non-European activities of the domestic insect control company of Sara Lee before from the application of the rest of the transaction. In the Commission's view, SC Johnson failed to demonstrate that the negative economic effects caused by the delay would have exceeded the usual consequences of the standstill obligation in the merger control procedure. Moreover, according to the Commission, SC Johnson had not sufficiently clearly distinguished in the application the operation of one and outside Europe[105].

Law 3959/2011 has no provision for carve-out. In practice, cut-off clauses, by which a concentration can be applied to another jurisdiction, i.e., Greece, earlier or pending CC's decision, are not welcome and will most likely be seen as circumvention of the standstill obligation. CC's approach is based on the premise that carrying out abroad by transferring control to the buyer inevitably enables him to control the commercial activities of the target company in Greece as well. This was the position taken by CC in the context of its decision in relation to the acquisition of the Center pulse Group's heart valve company by SNIA SpA, where it considered that the breach of the standstill obligation had not been eliminated by the fact that the parties had agreed in writing not to carry out the part of the acquisition that was owed to Greece. Thus, it imposed a fine of 35,000 euros on SNIA SpA[106].

3 Fines imposed for gun-jumping

3.1. Penalties - Fines

Infringements of the mandatory notification and the standstill obligation are subject to fines. Art. 14 para. 2 f. (a) of the Regulation states that 'the *Commission may, by decision, impose on the persons referred to in Article* 3(1)(b) *or* on the persons *concerned. fines of not more than 10 %* of *the total turnover* of *the* undertakings *concerned, as defined in Article 5, if* intentionally *or negligently: notify* a *concentration* pursuant *to Articles 4 or 22(3) prior to its implementation, unless they* are *expressly* permitted to *do so under* Article *7 paragraph 2 or by decision taken in accordance with Article 7 (3).'* For the infringement of the standstill obligation, point (b) of that article also allows the Commission to impose fines of up to 10% of the total cycle business operations of enterprises.

In determining the amount of the fine, the Commission must take account of the nature, gravity

[104] Decision of the European Commission of 11 April 2006, COMP / M / 414-Orica / Dyno
[105] Decision *SC Johnson/ Sara Lee as above*
[106] Decision of the EA of 20 June 2003 No. 243 / III / 2003.

and duration of the infringement[107]. Both violations are by nature serious[108], but their degree of severity varies depending on the specific facts of the case. A violation committed intentionally has a higher degree of gravity than an offence committed negligently. In the context of competition, infringements which have a serious impact on competition are certainly more serious than infringements committed in the course of mergers which they do not pose a threat to him[109]. On *Marine Harvest/Morpol* and *Altice/PT Portugal*, the Commission imposed respectively fines for breaches of both the notification obligation and the standstill obligation. On the other hand, on *Electrabel*, the Commission imposed fines only for breach of the standstill obligation since the breach of the obligation to notify was time-barred[110]. In the *Decisions Marine Harvest /Morpol* and *Altice/PT Portugal*, for example, the fact that the concentration was problem-making and required corrective action was taken into account as a factor in the gravity of the infringement.[111]

The Commission's decision in *Marine Harvest*, and its subsequent ratification by the General Court, shed additional light on the policy of imposing fines in cases of gun-jumping. While the obligation to suspend art. 7 para. 1, which applies to the implementation of the concentration both before its notification and before its liquidation by the Commission, appears to include and the demand of Art. 4 para. With regard to the General Court recently held that these are two different obligations for notification of the concentration in question before its implementation. Marine *Harvest* was fined EUR 10 million for the non-inification of the concentration in breach of Art. 4 para. 1 and a fine of EUR 10 million for the implementation of a concentration which has not been authorised by the Commission in breach of Art. 7 para. 1 of the Regulation. Marine Harvest appealed against this decision and argued that the imposition of a fine for each article separately constituted a breach of the principle of ne bis in idem, since, the violation of art. 4 para. 1 necessarily entails a violation of Art. 7 para. The Commission by doing so, the same behavior is punished twice. However, the General Court rejected those arguments and argued that Art. 14 para. 2 f. b) of the Regulation treats the above two articles as two separate grounds for imposing a fine and that the violation of Art. 7 para. 2 does not necessarily imply a violation of Art. 4 para. 1[112] the G.C. considered that the possibility of 'triggering' two provisions for the same action in one decision does not violate the principle *of ne bis in idem* either, nor the principle of *"apparent confluence"* or *"false confluence"*. In addition, the GC confirmed the Commission's characterisation of the infringement of Art. 4 para. 1 as a single infringement (at the time when the meeting should have been notified) and the infringement of Art. 7 para. 1 as an ongoing infringement, which lasts from the moment the concentration is implemented until its approval. Paradoxical consequence of the differences between the two provisions in the event that the fines could not be imposed cumulatively would be for the legislation to penalise the partial application

[107] See, no. 14 par. 3 Regulation: When determining the amount of the fine, the nature, the seriousness are taken into account and the duration of the infringement

[108] Decisions of Electrabel v Commission., para. 235 and Marine Harvest ASA v Commission,para. 480

[109] *Marine Harvest ASA v Commission*, para. 500-501

[110] The obligation to notify constitutes an immediate infringement committed by the failure to notify it before notification and is subject to a limitation period of three years. On the contrary, the obligation to rise is a continuing infringement, which remains in progress for the period pending approval of the transaction and is subject to a five-year limitation period. The deadlines are set in Regulation no. 2988/74 of 26 November 1974 laying down statute of limitations for proceedings and the imposition of sanctions under them European Economic Community rules on transport and competition.

[111] *Marine Harvest / Morpol*, para. 150-158 and *Altice / PT Portugal*, para. 587- 594

of a merger before liquidation more strictly than non-compliance with the notification obligation[113].

In spite of all this, the Court acknowledged the embarrassment caused by the overlapping of the two articles, pointing out that *"the current legislative framework* is *unusual. There are two articles in the Regulation concerning an infringement, which is punishable by fines of the same scale of penalties, but where there is an infringement of the first, it also implies the need to violation and the second. However, it should be noted that that is the legal regime which the Commission is called upon to apply and that the applicant has not raised a plea of illegality concerning specific provisions of Regulation[114].* The way in which the Court has formulated its judgment suggests that there may be room to challenge the legality of Art. 14 para. 2 f. (b) if the Commission continues to impose fines based on both articles in the future[115]. However, any revision of the Rules of Procedure will certainly correct this tension[116].

Decisions finding a breach and imposing fines are subject to judicial review. Businesses can challenge both the factual and the legal part of the decision at the General Court. The. GC has full responsibility for control of the amount of the fine, which means that it can cancel, reduce or increase the fine. A further action before the CJEU may concern only points of law.[117]

In addition to fines, the EU Merger Regulation also empowers the Commission to take interim measures in relation to the breach of the standstill obligation. In particular, the Commission may take steps to restore or maintain effective conditions of competition where a concentration has already been implemented but has not yet been approved by the Commission, which may ban it or even order its dissolution.[118]

In Greece, the implementation of the merger before the decision of the Competition Commission at the level of administrative penalties entails a high fine, which can reach thirty thousand (30,000) eur (without exceeding in any event ten per cent (10%) of the total turnover of the undertaking as defined in Article 10)[119] culpable infringement of the prohibition of suspension, a fine of at least thirty thousand (30,000) euros is also imposed by the Competition Committee, which in any case cannot exceed ten per cent (10%) of the total turnover as defined in Article 9.

3.2. **Fines at the EU level and legal framework in other Member States of the EU**

Research on fines thresholds in the European jurisdictions shows two interesting facts:

[113] Decision T-704/14, para. 297-374
[114] Decision T-704/14, para. 306
[115] Decision T-704/14, para. 294 and 303

[117] OECD (2018) '*Suspensory Effects on Merger Notifications and Gun Jumping- Note by the European Union'*, page. 7
[118] Article 8 par. 4, 5 and 6 of the Regulation. See No. 9 par. 4 L 3959/2011
[119] Article 6 para. 4 L. 3959/2011

- the vast majority have the threshold applicable to substantive gun-jumping set at 10 % of turnover; and

- some of the jurisdictions with both procedural and substantive gun-jumping prohibition set different thresholds for a violation of procedural and substantive gun-jumping (see e.g., Belgium, Croatia, Malta or Spain);

As for the setting of the threshold for substantive gun-jumping, it is understandable that the maximum threshold is set to 10%, because seriousness of a concrete substantive gun-jumping violation cannot be predicted. On the other hand, it is striking that the ECMR has left the previous approach [120] of the EU merger control regime and established same threshold for both procedural and substantive gun-jumping. Even more intriguing is the fact that the EC imposed equal fines for both procedural and substantive gun-jumping in *Marine Harvest / Morpol*. [121] The EC considered that *Marine Harvest / Morpol* negligently violated both procedural and substantive gun-jumping prohibition within a concentration, which raised serious competition concerns. The EC correctly stated that violation of procedural gun-jumping prohibition is an instantaneous infringement and violation of substantive gun-jumping is an ongoing infringement.[122]

However, the EC did not consider this significant difference and imposed an equal amount of EUR 10,000,000 (in total EUR 20,000,000) for both procedural and substantive gun-jumping without further explanation.[123]

In my opinion, the approach of the EC in *Marine Harvest / Morpol* should not be followed in other cases. Equal number of fines for both substantive and procedural gun jumping does not respect a greater importance of the substantive gun-jumping. The EC acknowledges the difference between substantial and procedural gun-jumping, so this difference should be reflected in practice. To sum up, the ECMR should return to the threshold difference between substantial and procedural gun-jumping, which was adjusted in the previous regulation.

Some authors considered EUR 20,000,000 fines in the context of same fine in

[120] Under Articles 14(1)(a) and 14(2)(b) of COUNCIL REGULATION (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, different thresholds for procedural and substantive gun-jumping applied. While substantive gun-jumping fine threshold was set on 10 % of aggregate turnover, procedural gun-jumping fine rule set fines at the level of from ECU 1 000 to 50 000.
[121] See Decision of the European Commission of 23 July 2014, *Marine Harvest / Morpol*, Ref. No. COMP/M.7184, Article 2 and 3 of the ruling
[122] Ibid., para 203
[123]Ibid., para 207.

Electrabel [124] an attempt of the EC to set out a benchmark for fines in gun-jumping cases. However, this assumption has been disproved by the latest fine in *Altice / PT Portugal*. [125] The amount of the total fine imposed by the EC in gun-jumping cases gradually increases which support a conclusion that the EC is stricter in gun-jumping cases.

The NCAs of other EU Member States clearly recognise and follow the EC's stricter approach on gun-jumping. [126] For example, the Slovak NCA recently imposed [127] significantly stringent fines compared to the Czech practice. Also, the Slovak NCA considers an adopting of specific guidelines on fines regarding the fines imposed in connection with merger control. [128] Also the French NCA hardened its politics regarding gun-jumping fines, when it imposed EUR 80,000,000 fine to *Altice*.[129]

3.3. **Summary regarding current fining policy**

If a merger does not raise any competition concerns (or even indicates significant procompetitive effects), one might start to wonder whether an imposition of sanction is needed. In my opinion, the complete absence of a sanction in such a case does not correspond to the purpose of gun-jumping as an enforceable rule protecting the very meaning of *ex ante* merger control regime.

The increases in the significance of the fines imposed for gun-jumping at the EU level corresponds to the tougher approach of the European jurisdictions generally, but it should not be overestimated. The Ernst & Young case shows that an assessment of the effects of gun-jumping are not necessary to establish that the stand-still obligation was violated. However, the possible effects of infringement are taken into account at least when imposing a fine.[130]

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[124] CARLONI, F. ELECTRABEL / COMPAGNIE NATIONALE DU RHONE v. Commission & COMP M.7184 Marine Harvest / Morpol / Morpol: Gun-jumping and violation of the Merger Standstill Obligation in Europe. *Journal of European Competition Law & Practice*, 2014, Vol. 5, No. 10, p. 696.

[125] See Mergers: Commission fines Altice €125 million for breaching EU rules and controlling PT Portugal before obtaining merger approval, op. cit.

[126] See e.g. KELLY. H., SCANLAN, R., SHINKWIN, S. Gun-jumping investigations: implications for the Competition and Consumer Protection Commission. *VLEX* [online]. 10 May 2018 [accessed 25 May 2018]: "[the EC] *has been encouraging national competition authorities (including* [the Irish NCA]*) to follow its lead in taking a harder line on gun-jumping.*"

[127] See decision of the Slovak NCA of 28 May 2018, *EP Industries / SLOVENSKÉ ENERGETICKÉ STROJÁRNE*, Ref. No. 2018/NIK/POK/3/15, para 58, where the Slovak NCA stated that imposed fine represent 3,4 % of total turnover of the EP Industries, a.s. in 2016

[128] See Workshop o novinkách o činnosti Protimonopolného úradu Slovenskej republiky. *Protimonopolný úrad Slovenskej Republiky* [online]. 10 May 2018 [accessed 25 May 2018], slide 25.

[129] See Decision of the French NCA of 8 November 2016, *Altice*, Ref. No. 16-D-24

[130] The EC or the Slovak take into account that voting rights were not exercised, see decision of the EC of 23 July 2014, *Marine Harvest / Morpol*, Ref. No. COMP/M.7184, paras 196 to 200 and decision of the Slovak NCA of 28 May 2018, *EP Industries / SLOVENSKÉ ENERGETICKÉ STROJÁRNE*, Ref. No. 2018/NIK/POK/3/15, para 53. However, in the context of the facts stated in Section 3.2, it would be appropriate if such cases were not considered gun-jumping violations.

To sum up, it is important that the threshold for maximum fines regarding gun jumping in the European jurisdictions is generally set at the 10 % of undertaking's turnover, because the seriousness of a concrete substantive gun-jumping violation cannot be predicted.

4. Measures to Prevent and Avoid Gun-Jumping

4.1. Approach of the competition authorities

The main goal of competition regulation is the protection of competition as an important value of a modern economic society. In this context, the competition authorities should generally emphasize prevention of any infringements of competition rules. For a well-functioning *ex ante* merger control, prevention from those gun-jumping presents a crucial interest.

Competition authorities worldwide treat prevention of gun-jumping differently. In addition to their general activities, such as organizing conferences, seminars and publishing brochures on general merger control issues, the main prevention activity is represented by their s*oft law* instruments. Although s*oft law* is considered an intangible concept, [131] its importance in competition law is undisputable. Taking into account specifically gun-jumping, two types of *soft law* can be described:

- Guidelines of the competition authorities defining gun-jumping, its typical practices and rules on its assessment by the authority; and
- Guidelines on how to reduce the risks of gun-jumping.

An example of the former can be found in the Czech Republic. [132] Although Czech Notice on gun-jumping contains recommendations on prevention from the gun jumping,[133] main aim of these guidelines is to clarify the limits of gun-jumping infringements taking into account the specifics of concrete practices. Based on these guidelines, parties should be able to understand what is allowed and what is prohibited during a merger process.

On the other hand, the main aim of the guidelines regarding procedures leading to the reduction of gun-jumping risks rests in suggestions on concrete procedures leading

[131] See e.g. ŠILHÁN, J. *Soft law s hard core účinky*. IN: Days of Law, 1. ed. Brno: Masaryk University, 2010. ISBN 978-80-210-5305-2. *Masaryk University* [online]. 2010 [accessed 8 April 2018]. p. 3171, n. 2

[132] Notice on the prohibiton of implementation of concentrations prior to the approval and exemptions thereof. Úřad pro ochranu hospodářské soutěže [online]. © 2012 Úřad pro ochranu hospodářské soutěže [accessed 8 April 2018].

[133] See Ibid., para 15: "*The most reliable solution to **avoid any doubt** from the competition law point of view is to condition the validity of the transfer of shares by the legal force of the Office's decision approving the concentration between undertakings.*"

to the avoidance of gun-jumping. Examples of these types could be found in Brazil[134] or USA.[135] Brazilian Guidelines are considered especially innovative and important step towards legal certainty.[136]

In my opinion, guidelines regarding procedures leading to the reduction of gun jumping risks are more understandable for the merging parties. Instead of complex describing of allowed and prohibited steps in merger process (typically conducted by lawyers supervising the merger), these guidelines enable to concentrate on functioning of the mechanisms adopted to prevent gun-jumping from happening. Therefore, an introduction of guidelines providing for such mechanisms is highly recommended to competition authorities, as well as it is recommended to the merginh parties to abide by them.

4.2. Measures to Prevent and Avoid Gun-Jumping

The main objective of regulating competition is to protect competition as an important value of modern economic society. In this context, competition authorities should generally emphasise the prevention of infringements. For effective ex ante merger control, prevention from the gun-jumping trap is of huge interest. That is why the Commission (and the national competition authorities in general) must be active by establishing clear possibilities for preventing the gun-jumping from the merging parts themselves. The French Competition Authority seems to be the first to take action in this direction. A series of 'general principles' are formulated in this chapter, which probably go beyond the facts of the case under consideration, thus implying that the French Competition Authority took the case as an opportunity to draft and issue unofficial guidelines on gun-jumping[137].

Competition authorities around the world treat this prevention differently[138]. Apart from general activities, such as organizing conferences and seminars or publishing brochures on the subject, the main prevention activity is soft law, which, although considered intangible, its importance in competition law is indisputable. Regarding gun-jumping, two types of soft law can be described: a) the Guidelines of the Principles of Competition that define what gun-jumping is, the typical its characteristics and the rules regarding its assessment by the authority, and b) the Guidelines on how to avoid the risk of committing anyone gun-jumping[139].

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[134] Guidelines for the Analysis of Previous Consumation of Merger Transactions. *Conselho Administrativo de Defesa Econômica* [online]. Conselho Administrativo de Defesa Econômica [accessed 20 May 2018].

[135] VEDOVA, H., CLOPPER, K., EDWARDS, C. Avoiding antitrust pitfalls during pre-merger negotiations and due diligence. *FTC* [online]. 20 March 2018 [accessed 20 May 2018]. Character of this *"soft law"* instrument may be questioned, but it raised a big discussion among American practitioners; see e.g. MAHAN, C., HAYES, N. New FTC Guidance on Information Exchange Highlights Need for Safeguards During Due Diligence and Integration Planning. *Weil, Gotshal & Manges LLP* [online]. 16 April 2018 [accessed 21 May 2018].

[136] See DRAGO, B., MORSELLI, F. Clarifying Gun Jumping Through Guidelines: The Brazilian Experience. *Journal of European Competition Law & Practice*, 2016, Vol. 7, No. 2, p. 134

[137] Giner, M. (2017). page. 6

[138] In Ireland, for example, since 2003 the Competition and Consumer Protection Commission has issued an Announcement warning and informing companies about gun-jumping

The practical implementation of the suspension obligation is not always easy. The fact that no legal definition is given in the Regulation, nor is there any guidance on the concept of early application, makes the situation more difficult. As the Advocate-General rightly pointed out in Ernst&Young, the lack of any total explanation of the application of Art. 7 para as far as Point 1 of the Regulation is concerned, it is remarkable when you consider that the fines imposed by the Commission were by no means insignificant.

Indeed, with Altice, the Commission opened Pandora's box, extending the concept of gun-jumping to certain pre-closure operations and to common design practices. the completion of the transaction. Distinguishing between permitted planning activities and prohibited implementation activities during the period of suspension is not easy, but even the smallest mistake manipulation can be fatal for the parties, who in any case must not act as if their agreement had already been concluded.

In my opinion, the Guidelines should be enriched with clear and comprehensible procedures and deterrent mechanisms leading to the reduction of gun jumping. At the same time, it is now imperative to "codify" what is allowed and what is not allowed. This codification should be carried out in the light of a balance between the interests of both sides. On the one hand, the Commission sets all these rules and limits with a view to ensuring effective competition and preventing irreversible damage in market conditions. On the other hand, there is the interest of merging companies for the quick liquidation of the merger, and especially the interest of the buyer in maintaining the value of the target business, i.e., its investment. Decisions concerning gun-jumping may not yet be many, but they can be the basis for an initial codification, thus giving jurisprudence flesh and bones[140].

But there is also a third factor, which was raised by the CJEU itself in Ernst&Young and would advocate a limitation of the scope of the standstill obligation. This is the interaction between Regulation 139/2004 and Regulation 1/2003 on the application of Articles 101 and 102 TFEU. In essence, Regulation 139/2004 applies to any transaction constituting a concentration to which Regulation 1/2003 does not apply. In this context, the CJEU explained that the application of Art. 7 para. 1 of Regulation No 139/2004 to any action which does not contribute to the implementation of a concentration would unduly extend the scope and, in the same way, would it reduce the scope of Regulation No 1/2003. Therefore, the Commission should be very careful in the future and carry out the above weighting if it decides to take action on the specific issue.

The most difficult issues of gun-jumping arise as a result of three types of action that take place before the commission clears the merger: a) the unprotected exchange of information and the coordination of the competitive behavior of the merging companies before and after the signing, b) the actions for the integration of the target business into the enterprise (c) the latter's participation in the business activity of the target.

5. The warehousing problem

[140] Lapresta, A. (2019)

The concept of "warehousing" can be defined as a scenario, whereby "*an undertaking is 'parked' with an interim buyer, often a bank, on the basis of an agreement on the future onward sale of the business to an ultimate acquirer. The interim buyer generally acquires shares 'on behalf' of the ultimate acquirer, which often bears a major part of the economic risks and may also be granted specific rights. In such circumstances, the first transaction is only undertaken to facilitate the second transaction and the first buyer is directly linked to the ultimate acquirer.*" [141] The EC states that the transaction by the interim buyer will be considered as the first step of a single concentration comprising the acquisition of control by the ultimate acquirer. Warehousing is considered a serious gun-jumping issue by the doctrine. [142] Currently, there are two reasons for taking warehousing seriously:

- the EC is investigating an alleged warehousing in the *CANON / TOSHIBA MEDICAL SYSTEMS CORPORATION* case, [143] which has been already recognised as gun-jumping in China;[144]

and

- the *Ernst & Young* case opened the discussion on the nature of warehousing.[145]

According to the Commission, the transaction with the intermediary buyer will be considered as the first step of a single concentration, involving the permanent acquisition of control by the final buyer.

Art. 3 of the Regulation provides for a further exception to the notification requirement. With the Canon case it now seems to be in the context of the implementation of merger control. According to this, the acquisition of securities by 'credit institutions or other financial institutions or insurance companies' does not constitute a concentration provided that the purchaser of the resents within the year. Canon is expected to clarify whether the Commission will consider whether the change in control within the meaning of the Regulation occurs when the full exchange takes place. payments and risk between seller and buyer or when the buyer actually exercise himself full control of the shares[146].

In August 2016, Canon announced its proposed acquisition of TMSC to the Commission. The Commission in turn approved the transaction unconditionally in September 2016. The transaction took place in two stages: During the first stage, Toshiba transferred 95% of TMSC's shares to MS Holding Corporation for 800 euros. MS Holding was a special purpose vehicle created indirectly by Toshiba and Canon through a third party, a law firm. Canon immediately paid Toshiba the full

[141] Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01), para 35

[142] BAILEY, D., ROSE, V., MACNAB, A. *European Union law of competition*. 7th ed., 2014 edition. Oxford: Oxford University Press, 2014. ISBN 978-0-19-968947-7. p. 540, n 8.049

[143] See information on *CANON / TOSHIBA MEDICAL SYSTEMS CORPORATION* case before the EC in Annex C

[144] See CRUISE, J. China's MOFCOM Announces First-Ever Gun-Jumping Penalty in a Transaction Not Involving a Chinese Company. *Latham & Watkins* [online]. 9 January 2017 [accessed 20 May 2018].

[145] See NOURRY; 2018; op. cit

[146] Hull D. και Gordley C., page. 6

purchase price of 5.28 billion euros for a 5% stake in TMSC and a 95% buyout right of 95% of its shareholding. intermediate buyer. In the second stage, Canon exercised its right to acquire 100% of the shares in TMSC. The Commission's decision finds that the above stage is part of a single concentration. The Commission's press release explicitly states that the first step was necessary for Canon to acquire control of TMSC. This analysis is linked to the analysis of the illegal "partial application" of a trade in the *Ernst & Young* judgment concerning measures involving a "direct functional connection" with the implementation of a merger, i.e., measures necessary to achieve the change of control. These measures must be distinguished from purely secondary or preparatory measures taken in the context of a transaction which are not necessary to gain control on the target. In its decision, the Commission seems to be making a U-turn to address warehousing in the light of what is stated above in the Communications, which states that it is clearly that warehousing agreements involving two stages, where the objective is temporarily 'assigned' to an intermediary third-party buyer can be regarded as a partial application of a single concentration, even if the buyer does not acquire control during this interim period. The process followed by the parties in Canon/Toshiba ortan was a combination of warehousing and selection structure, which does not seem to be reasonable from a competition point of view.

Originally, MS Holding was not an independent third-party mediator, but a corporate vehicle created by Canon and Toshiba through a third-party law firm. In the USA, this construction was seen as a way for companies to avoid the US law requiring notification of a merger[147]. Secondly, the selection structure did not allow Canon to exercise real control but allowed it to pay the full price for the purchase. This means that Canon took over the entire commercial risk of TMSC from the day of acquiring the[148] option. This raises the question of whether the choice was a real "choice" in the first place.

The biggest question is whether more powerful forms of warehousing, such as the "reverse" assignment, in which the bank or a third party is the default buyer of the target in case of that there is ultimately no approval, will be considered to be in line with the rules for gun-jumping or if they should be judged ad hoc depending on the legal construction of each legal construction[149]. In my opinion, the question of the necessity of "entrusting an undertaking" to an intermediate buy-in should be analysed on acase-by-case basis, since it may be there are situations, such as a lack of capital, where the participation of a bank as an intermediary buyer is necessary. Of course, warehousing should not be used as ameans of avoiding the notification obligation and the obligation to suspend (bank participation due to necessity as preparatory act v. as a means of evying obligations).

Since the EC's *CANON / TOSHIBA MEDICAL SYSTEMS CORPORATION* case is pending, it is difficult to draw any conclusion on the gun-jumping assessment of warehousing. *CANON / TOSHIBA MEDICAL SYSTEMS CORPORATION* case in China

[147] United States District Court for the District of Columbia: "Complaint for Civil Penal Ties for Failure to Comply with the Premerger Notification and Waiting Requirements of the Hart-Scott Rodino Act", para. 5

[148] Complaint as above, para. 27

[149] Peristerakis, N. and McMartin, M. (2019). *Canon fined €28 million for gun jumping by way of a two-step warehousing structure* | News and Deals | Linklaters. [online] Linklaters.com. Available at: https://www.linklaters.com/en/insights/publications/2019/june/canon-fined-28-million-for-gun-jumping-by-way-of-atwo-step-warehousing-structure

also does not provide enough guidance regarding how to assess warehousing, since it is not clear how the Chinese NCA came to the conclusion that warehousing should be considered a violation of the gun-jumping prohibition.[150] However, in the light of the *Ernst & Young* case, it is interesting to ask the above-mentioned questions on the necessity and preparatory character of gun-jumping.

In my opinion, the question of necessity of "parking an undertaking" with an interim buyer should be analysed on case-by-case basis, since there might be situations (e.g., lack of capital), where the participation of bank as an interim buyer is indispensable. However, parking should not be misused to avoid the obligation to notify and stand-still obligation in the first phase of a single concentration. Moreover, the preparatory character should be reviewed on a case-by-case basis, due to the same risks those related to the necessity criterion (participation of bank as a preparatory act v. avoidance of an obligation to notify). Since the situation is not clear as of now, warehousing and its clarification in the *CANON / TOSHIBA MEDICAL SYSTEMS CORPORATION* case may be additional "puzzle piece" on the future of gun-jumping development. However, it should be noted that for such a further and very expected development in decision-making practice on gun-jumping, it is crucial for the *CANON / TOSHIBA MEDICAL SYSTEMS CORPORATION* "puzzle piece" to fit into the frame delimited by the *Ernst & Young* case.

CHAPTER FOUR

6. EPILOGUE

6.1. Conclusion

The purpose of this thesis is to analyze the nature of gun-jumping and the reasons standing behind it, its effects, several problematic areas and their solutions within the framework of the Greek competition law and EU competition law.

The legal framework for gun-jumping differs between European jurisdictions, but it seems to be structured around two main regulations: the prohibition of the early implementation of a concentration under the standstill obligation and the prohibition of early implementation supplemented by the notification obligation. There are jurisdictions based solely on the notification requirement. As mentioned, such arrangements are not appropriate in the context of ex ante merger control, since their applicability is compromised because of the lack of the prohibition of early implementation, which thus becomes an essential component of the effective functioning of the preventive control of concentrations.

[150] See CRUISE; 2017; op.cit.

However, it must be made clear that in Greek and Community competition law the prohibition on the first implementation of the concentration does not deport the validity of the other competition rules regulating the conduct of undertakings. In fact, the Court has also clearly separated gun-jumping from the impact that an action can have on the market. In my opinion, this distinction leads to the conclusion that gun-jumping is more a breach of a formal legal obligation than a breach linked to the market situation, such as the abuse of a dominant position[151]. This is a very important finding, which should from now on be taken into account in the imposition of sanctions, so that any penalty can be taken into account is proportionate and corresponds to the gravity of the infringement. The decision-making practice on gun-jumping at EU level has begun to develop in recent years. The EU has left behind its well-intentioned approach, according to which gun-jumping cases were concluded without any sanction being imposed. The debate on the general conditions under which gun-jumping infringements should be assessed has recently been reopened, with the latest judgments of the Commission, the Court of Justice. but also, of the national competition authorities to be useful guides for this assessment.

The case-law agrees that actions by which a concentration is carried out during the period of compulsory suspension (by changing its supervision and by allowing it to have decisive influence. target enterprise) and actions that lead to the effective coordination of the business behavior of the merging enterprises before the coveted approval, will be illegal, regardless of whether they infringe the merger control rules or the cartel rules. The key points of an evaluation, therefore, are the answer to the following questions. Is this transaction necessary, this step to make a change in the control of the target company? Is the transaction/step secondary or preparatory in the chain of transactions leading to an acquisition of control? Although the questions are quite abstract and should be assessed on a case-by-case basis, decisions point to the direction in which they should be an evaluation is initiated with a view to achieving greater legal certainty and a compromise between the parties' interest in the rapid completion of the audit, and of the Commission to safeguard the competing status quo.

The challenge is how to distinguish between lawful and unlawful conduct in the specific circumstances of each individual case, in which the facts often make it difficult to drawing of rules-conclusions that could be applied in general.

In my opinion, a real and economically oriented approach to gun-jumping is more accurate. Gun-jumping can be described as a threat to competition, since most mergers are not prohibited. It could therefore perhaps be regarded as a 'result' infringement when the Competition Authority assesses whether the notification and/or deferral obligations were breached by the real behaviour of the participants in the concentration, not only by creating a possibility of a breach of the standstill obligation.

If the purpose of the prohibition is to maintain effective competition on the relevant market and to ensure the functionality of the ex ante merger control regime, the Competition authorities must make a balancing act and not intervene in cases where the chances of a real infringement being carried out are from non to few. They should do the same weighting in the imposition of penalties,

[151] Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (Text with EEA relevance)

in that the acquisition of the possibility of control should not lead to the same assessment as the actual exercise of this, especially in cases where the parties appear to have exercised the utmost diligence not to deviate from the procedure (e.g., clauses in the SpA stipulating those agreements existing in it will have effect after approval by the Authority).

In my view, the prevention of gun-jumping should be the main target of the authorities. Perhaps the Commission's Guidelines should be enriched with a chapter on the prevention and prevention of gun-jumping. Such a change would provide clarification to the merging parties as to specific practices from which they might have to abstain or to specific measures which they might have to refrain from or to specific measures which they may have to refrain from. could be taken to avoid being held accountable for committing - possibly unintentional – violations. At the same time, the Commission should become more active, for example by providing detailed guidance on published decisions, guidelines, organizing public interventions/debates, as well as through an opening by the competition services to provide specific advice to the merging companies. Perhaps it should also change the way in which it deals with mechanisms such as the request for derogation and the Carve-out, thus giving the incentives to the companies that are in a hurry to carry out the merger not to try to deviate from the legal process in unfair or fraudulent ways.

Since there are no formal commission directives and/or notices, the parties will have to 'build' their strategy around three general pillars: the proper timetable so as to adapt and control the level of exchange of information and joint decision-making at each stage of the trade, the need to limit the interaction of the parties to absolutely necessary meetings and finally the limiting the number of people in contact with sensitive information, selecting independent information and placing safeguards by signing strict clauses; confidentiality. The EC has left its more benevolent approach to gun-jumping in recent years when some gun-jumping cases were concluded without any sanction. A number of decisions on gun-jumping is currently pending in many cases before the EC, the General Court and the CJEU and some answers on problematic practices and areas (such as the warehousing issue) are very awaited.

The decisions developed above essentially underline the awareness that members of the team overseeing the process of merger with regard to gun jumping should have. It is characteristic that in the French Altice, the Authority insisted on the fact that there is no such thing as a "checklist", i.e., a list of violations, some of which the conduct of the company in question appears to satisfy. The key element in this case was the fact that the parties showed a total indifference to the rules of gun-jumping and behaved very early on as one single company. The issue of gun-jumping is a given that it will not cease to be of concern in the future, because it is already pending before both the GC and the CJEU. cases, while at the same time the entire Commission decision on the Canon case is expected to be published from time to time, which we hope will shed light on. a little more the grey area, especially the suspension obligation.

With a certain delay in decision-making practice compared to their counterparts on the other side of the Atlantic, the competition authorities at the European level now seem to be interested in compliance with procedural rules. Admittedly, decisions are still few, but companies have understood that they must respect all aspects of the control of consultations, including the procedural aspects. The communication on convictions is also the same: the Competition

Authority[152] and the Commission[153] intend to send a "strong signal" to businesses. Deterrence is even stronger now that the Commission does not leave things to chance: the day Facebook was sentenced to a fine of EUR 110 million for incorrect notification[154], the Commission announced the start of thei nvestigation against d'Altice for early implementation of the acquisition of PT Portugal[155] which resulted in a fine of EUR 125 million. The amount is not negligible, especially when we consider the precedent and the strong reactions to the 80 million euros fined on Altice by the Authority in the context of a settlement procedure. The Commission's decision is awaited, in particular because it will clarify its position in governing the provisions of the Contract limiting the freedom to manage the target. However, it will not close the debate. Altice has already publicly stated its disagreement with the position adopted on this point and its decision to appeal[156].

These various cases seem above all to demonstrate a turning point in the implementation of competition law. The Commission now appears to be devoting resources to sanctioning conduct irrespective of its effects on the market[157]. Members of the Commission are also categorical that the offense of gun-jumping must be separated from the question of the effects of the conduct in question on the competitive situation. [158]. If this approach isnt objectionable in itself however, it requires the authorities to demonstrate pragmatism regarding the scope of the suspension obligation or the possibility to grant exemptions. Too restrictive an approach could hold back businesses who would consider embarking on growth operations and creating an excess of prudence which risks limiting the ability of companies to be able to issue synergies expected once the transaction has been authorized.

It is more justified not to adopt such an approach as the general voice Nils Wahl has largely de-dramatized the stakes attached to *gun-jumping*[159]. While the Commission speaks of a "serious infringement" which undermines the effectiveness of the merger control system, Nils Wahl recalls that the suspension has not been suitable in all Member States and gives it only a deterrent and procedural economic function for the Commission in the cases where 'the concentration should be dissolved in the event of unlawful pre-implementation'[160]. If the notification requirement is a pillar of the control system, giving the same importance to the suspensive effect seems excessive. The Commission often justifies its importance by the fact that notified transactions could be banned or abandoned. However, the statistics downplay the scope of the rule: in 2017, out of 380 notified operations, four were abandoned and two banned.

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[152] Authority press release of 8 November 2016 available at http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=629&id_article=2895&lang=fr.
[153] Press release of the European Commission IP/17/1369 of 18 May 2017
[154] *Ibid*
[155] Press release of the European Commission IP/17/1368 of 18 May 2017
[156] F. BRUNET, "DG Comp fines Altice €125 million for gun-jumping", Global Competition Review, 24 avril 2018, available at : https://globalcompetitionreview.com/article/1168357/dg-comp-finesaltice-eur125-million-for-gun-jumping,
[157] G. GETEYN, M. READINGS, J. WEBBER, supra note 31, p. 3
[158] T. WEBB, "DG Comp official resists need for effects in gun-jumping", Global Competition Review, 5 juillet 2017, Available at https://globalcompetitionreview.com/article/1144017/dgcomp-official-resists-need-for-effects-in-gun-jumping
[159] A. RONZANO, supra note 66.
[160] Conclusions in case C-633/16 cited above in note 1, pt. 35, p. 6

In so far as the European decision-making practice on *gun-jumping* is being built, the answers to the Court of Justice on 31 May as part of the EY / KPMG DK affair are therefore expected. It would also be positive if the authorities were to be open to the possibility of establishing a dialogue with companies during the suspensive period in order to proof of the pragmatism that some scenarios require.

7. CASE LAW

7.1. Decision of the European Commission of 24 April 2018, M.7993 | Acquisition of PT Portugal by Altice

Altice is a Dutch-based multi-national telecommunications company. Prior to the acquisition of PT Portugal, Altice operated in Portugal through two subsidiaries, Cabovisão and ONI. Cabovisão provided pay TV, fixed internet access and fixed telephony services essentially to residential customers. ONI provided services to business customers, including fixed telecommunication services, in particular voice, data, and internet access services as well as IT services. PT Portugal, a Portuguese-based telecommunications company, is a telecommunications and multimedia operator with activities extending across all telecommunications segments in Portugal, offering fixed, mobile voice and data services, broadband internet. On 9 December 2014, Altice entered into a transaction agreement with Oi, the Brazilian telecommunications operator which controlled PT Portugal, to acquire sole control of PT Portugal. The transaction was notified to the Commission in February 2015 and **approved in April 2015**, subject to the divestment of Altice's businesses in Portugal at the time, Oni and Cabovisão. The European Commission sent on 18 May 2017 a Statement of Objections over an alleged breach of the EU Merger Regulation by telecommunications company Altice by implementing its acquisition of PT Portugal before notification or approval by the Commission. On 24 April 2018, the Commission announced the decision to impose a €124.5 million fine on Altice for the breaching of the Regulation. The Commission found that Altice implemented its acquisition of PT Portugal before notification to or approval by the Commission under the EU Merger Regulation (in breach of Articles 4(1) and 7(1) of the EU Merger Regulation).

However, the General Court dismissed Altice Europe's action against the Commission decision imposing two fines totalling €124.5 million in connection with the acquisition of PT Portugal but ordered the amount of the fine relating to the breach of the obligation to notify the concentration to the Commission be reduced by €6.22 million.

7.2. Judgment of CJEU 31 May 2018, Ernst & Young, C-633/16, EU:C:2018:371

On 18 November 2013, the KPMG DK companies entered into a merger agreement with the EY companies ('the merger agreement').

At the material time, the KPMG DK and EY companies were both auditing firms active in auditing and accountancy services in Denmark.

At the time of conclusion of the merger agreement, the KPMG DK companies were members of an international network of independent auditing firms, known as KPMG International Cooperative ('KPMG International'). Since the KPMG DK companies were not structurally included in the KPMG International network, a cooperation agreement was concluded on 15 February 2010 between the KPMG DK companies and KPMG International ('the cooperation agreement'). Under that agreement, the KPMG DK companies had the exclusive right to be included in KPMG International in Denmark and to use the trademarks of KPMG International for marketing purposes in that Member State.

On 31 May 2018, the Court of Justice issued its judgment in which it ruled that the standstill obligation in Article 7(1) of the EU Merger Regulation applies only to transactions which, in whole or in part, in fact or in law, contribute to the change in control of the target undertaking. Further, the Court of Justice clarified that the termination of a cooperation agreement (such as the one in the present proceedings) may not be regarded as bringing about the implementation of a concentration, irrespective of whether that termination has produced market effects. As a result, the Court of Justice thus confirmed that there was no breach of the standstill obligation in this case.

7.3. Decision of the European Commission of 30 September 2013, *Marine Harvest / Morpol*, Ref. No. COMP/M.6850

Marine Harvest is a Norwegian seafood company active in salmon and halibut farming and processing. Morpol is also a Norwegian producer and processor of salmon. On 14 December 2012, Marine Harvest entered into a share purchase agreement (the "Initial Transaction"), pursuant to which it acquired 48.5% of the share capital of Morpol when the Initial Transaction closed on 18 December 2012.

Under Norwegian law, the acquirer of more than one third of the shares in a listed company is obliged to make a bid for the remaining shares in the company. Marine Harvest launched a public bid in compliance with that requirement and acquired a further 38.6% of Morpol's shares in March 2013 and the remaining 12.9% in November 2013.

The Commission considered that Marine Harvest has, through negligence, infringed Article 4(1), and Article 7(1) of the Merger Regulation. Both infringements are serious in light of the negligent conduct of Marine Harvest, the fact that the Transaction raised serious doubts as regards its compatibility with the internal market and the existence of precedents of fines for early implementation at national level. The infringement of Article 4(1) of the Merger Regulation is an instantaneous infringement whereas the infringement of Article 7(1) of the Merger Regulation had a duration of nine months and twelve days. The Commission considers that Marine Harvest's abstention from the exercise of voting rights at Morpol's general shareholders' meetings and the ring-fence of Morpol's activities are considered as mitigating circumstances. Moreover, Marine Harvest's willingness to promptly inform the Commission of its acquisition of Morpol is also an element which is considered as a mitigating factor. Finally, the Commission considers that there are no aggravating circumstances in this
case.

The Commission adopted the decision by putting into effect a concentration with a Union dimension in the period from 18 December 2012 to 30 September 2013, before it was notified and before it was declared compatible with the internal market, Marine Harvest ASA has infringed Article 4(1) and Article 7(1) of Regulation (EC) No 139/2004. A fine of EUR 10,000,000 was therefore imposed on Marine Harvest ASA for the infringement of Article 4(1) of Regulation (EC) No 139/2004 referred to in Article 1.

7.4. Judgment of the Court (Tenth Chamber) of 3 July 2014 Electrabel SA v European Commission

The Commission rendered its decision to fine Marine Harvest only a few weeks after the ECJ upheld in its entirety a EUR 20 million "gun jumping" fine on Electrabel that the Commission had imposed in 2009. This fine thus far constituted the only major penalty imposed by the Commission on a company for premature closing of a reportable transaction.[161]

Background and Merger Control Proceedings. Between June and December 2003, Electrabel, through a series of transactions, acquired 49.95% of the capital and 47.92% of the voting rights in CNR, a French public company active in the electricity sector. Several years later, in August 2007, Electrabel entered into discussions with the Commission to assess whether it had acquired de facto sole control over CNR and needed, therefore, to file a notification under the EUMR. The Commission concluded that it had. Electrabel subsequently filed a merger notification based on the assumption that it had acquired de facto sole control in the course of 2007. The transaction, which did not raise substantive competition law concerns, was cleared by the Commission in April 2008.[162] In its clearance decision the Commission, however, left open the question of the date on which de facto sole control had, in fact, been attained.

"Gun Jumping" Investigation. The Commission subsequently launched an investigation and concluded in its infringement decision that Electrabel had already acquired de facto sole control over CNR in December 2003.[163] In its reasoning it stated that, although Electrabel's shareholding remained below 50%, Electrabel would in practice enjoy a stable majority at CNR's future shareholder's meetings in light of the participation and shareholder voting patterns in the previous three years and the wide dispersion of the remaining shares. This was reinforced by other factors, including the fact that Electrabel was the sole industrial shareholder of CNR, held an absolute majority on CNR's management board as well as the ability to maintain that majority, and had taken over a central role in CNR's operational management.

[161] Previous fines were only a fraction of the fine imposed on Electrabel. In 1998, the Commission fined Samsung EUR 33,000 for late notification of a merger (Commission, Case IV/M.920 – *Samsung/AST,* decision of February 18, 1998) and, in 1999, it fined A.P. Møller EUR 219,000 for three separate failures to notify a merger (Commission, Case COMP/M. 969 – *A.P. Møller,* decision of February 10, 1999).

[162] Decision of the Commission of April 29, 2008, Case COMP/M.4994 – *Electrabel/Compagnie Nationale du Rhône*

[163] Decision of the Commission of April 29, 2008, Case COMP/M.4994 – *Electrabel/Compagnie Nationale du Rhône*

Appeal to General Court. Electrabel's subsequent appeal of the Commission's infringement decision was dismissed by the EU's General Court in its entirety.[164] In particular, the Court rejected Electrabel's argument that it could only have detected the acquisition of de facto sole control in 2007 when it was in a position to confirm that it had in fact achieved a consistent majority of the voting rights at CNR's shareholders' meetings over a time period of three years. The Court clarified that, also taking into account the specific circumstances of the case, the relevant period for the analysis of the attendance at shareholders' meetings were the years preceding the acquisition of the shareholding in question. The acquirer thus has a duty to assess the likelihood that it may acquire de facto control before a transaction takes place (prospective method).

Another argument raised by Electrabel in its appeal related to the limitation period applicable to "gun jumping" infringements. Electrabel maintained that the Commission's power to impose a penalty was time-barred on grounds that the infringement was of a procedural nature and that therefore a three-year limitation period applied. The Court, however, took the view that a gun jumping offense does not simply concern an absence of a notification but a conduct that gives rise to a structural change in the conditions of competition and therefore cannot be characterized as purely formal or procedural in nature. It thus considered that a five-year limitation period was applicable. In relation to the starting point of the limitation period, Electrabel submitted that the breach in question constituted an instantaneous infringement and that the limitation period should therefore have been calculated from the day on which the transaction was implemented. The Court rejected this position, holding that the infringement was continuous until the date on which the Commission granted its clearance.

Appeal to ECJ. Electrabel's subsequent appeal of the General Court's judgment to the ECJ was dismissed, mainly on procedural grounds. As regards the limitation question, the ECJ did not expressly endorse or reject the General Court's approach as it found the distinction between instantaneous and continuous infringements to be irrelevant to the case in question. The five-year limitation period would in any event have been interrupted by a procedural measure taken by the Commission in 2008 and would therefore not have elapsed, even if it had already started running on the day Electrabel acquired de facto sole control over CNR.

The General Court indicated that the fine imposed was at the 'lower end' of what could have been imposed. It also confirmed the Commission's view that a gun jumping offence cannot be considered as purely formal or procedural in nature—as it involves not only an absence of notification but also a conduct giving rise to a structural change in the condition of competition—and that, consequently, the five-year limitation period applicable to substantive infringements (as opposed to three for procedural infringements) should apply. The Court of Justice confirmed this approach in July 2014 in Electrabel v Commission, stating that the breach of the standstill obligation is serious, as it undermines the essence of EU merger control.

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[164] Judgement of of the General Court of 12 December 2012, *ELECTRABEL / COMPAGNIE NATIONALE DU RHONE,* Ref. No. T-322/09. In: *CURIA* [legal IS]. European Union Publication Office [accessed 25 February 2018]. Available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=131705&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=376859

BIBLIOGRAPHY

Books

- BAILEY, D., ROSE, V., MACNAB, A. *European Union law of competition*. 7th ed., 2014 edition. Oxford: Oxford University Press, 2014. ISBN 978-0-19-968947-7.
- BAILEY, D. JOHN, L. E. *Bellamy & Child: European Union Law of Competition*, 8th ed. Oxford: Oxford University Press, 2018. ISBN: 978-0-19-879475-2
- DAVIES, J., and others. *MERGER CONTROL 2018*. UK: Getting the Deal Through, 2017, ISSN:1365-7976
- FAULL, J., NIKPAY, A. and TAYLOR, D. *The EU law of competition*. 3rd ed. Oxford: Oxford University Press, 2014. ISBN 978-0-19-966509-9.
- GOOD, M. *Cambridge advanced learner's dictionary*. 3rd ed. Cambridge: Cambridge University, 2008. ISBN 978-0-521-71266-8.
- KOKKORIS, I. and SHELANSKI, H. A. EU merger control: a legal and economic analysis. Oxford: Oxford University Press, 2014, ISBN 978-0-19-964413-1
- TZOUGANATOS D. *Competition Law in Greece* Nomiki Vivliothiki, 2013 ISBN: 978-960-562-084-4

Journal Articles and Internet Sources

- BOYCE, A., CROFTS, L. Comment: Europe gets serious about 'fast and loose' mergers. *Mlex* [online]. 19 May 2017 [accessed 15 April 2018]. Available at: http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=889083&siteid=190&rdir=1
- CARLONI, F. ELECTRABEL / COMPAGNIE NATIONALE DU RHONE v. Commission & COMP M.7184 Marine Harvest / Morpol: Gun jumping and violation of the Merger Standstill Obligation in Europe. *Journal of European Competition Law & Practice*, 2014, Vol. 5, No. 10, pp. 693-696. ISSN 2041-7764
- CAVE, B. European Court of Justice Clarifies Scope of Gun Jumping Prohibition, *Lexology*[online], 1 June 2018. Available in: https://www.lexology.com/library/detail.aspx?g=49baa855-74ac-47ed-800c-823d1f5e62da
- CRUISE, J. China's MOFCOM Announces First-Ever Gun-Jumping Penalty in a Transaction Not Involving a Chinese Company. *Latham & Watkins* [online]. 9 January 2017 [accessed 20 May 2018]. Available at: https://www.lw.com/thoughtLeadership/china-MOFCOM-gun-jumping-penaltytransaction-not-involving-chinese-company
- DEPOORTERE, F. MOTTA, G. Gun-Jumping: Recent Developments in EU Merger Control Enforcement. *The International Comparative Legal Guide to: Merger Control 2019*, 15th ed. 2019 ISSN 1745-347X

- DIRECTORAT-GENERAL FOR COMPETITION (European Commission). EU Competition Law Rules Applicable to Antitrust Enforcement, Vol. 1: General rules. *Publications Office for the European Union.* 16 Μαρτίου 2015. ISBN978-92-79-19537-2
- G. GETEYN, M. READINGS, J. WEBBER, "The EU Commission sends a statement of objections to a company to investigate whether a merger was implemented prior the Commission's clearance", *e-Competitions Bulletin*, n° 84212, pp 1-3
- Marinos, M. (2010) "Prohibition of the implementation of the concentration within the meaning of article 44 of Law 703/1977 and exchange of information", CJEU 12/2010, page. 1270
- MAYR, M. Austria to introduce Transaction Value Merger Notification Threshold. *Kluwer Competition Law Blog* [online]. 10 April 2017 [accessed 8 January 2018]. Available at: http://competitionlawblog.kluwercompetitionlaw.com/2017/04/10/austria-tointroduce-transaction-value-merger-notification-threshold/
- Mergers: Commission alleges Altice breached EU rules by early implementation of PT Portugal acquisition. *European Commission* [online]. 18 May 2017 [accessed 8 January 2018]. Available at: http://europa.eu/rapid/press-release_IP-17-1368_en.htm
- Michael C. NAUGHTON, "Gun-Jumping and Premerger Information Exchange: Counseling the Harder Questions", *Antitrust Magazine*, Vol. 20, n°3, 2006.
- OECD. Suspensory Effects of Merger Notifications and Gun Jumping. *OECD* [online]. 20 February 2019. Available online at: https://one.oecd.org/document/DAF/COMP/WD(2018)95/en/pdf
- R. LIEBESKIND, "Gun-jumping : Antitrust Issues Before Closing the Merger", Antitrust Committee ABA Annual meeting, 2003.
- VESTAGER, M. Competition and the Rule of Law. *European Commission* [online]. 18 May 2017. Available at: https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-and-rule-law-0_en
- W. BLUMENTHAL, "The Rethoric of Gun-Jumping", Remarks before the Association of Corporate Counsel, Annual Antitrust Seminar of Greater New York Chapter: Key Developments in Antitrust for Corporate Counsel, New York, November 10, 2005.
- WILSON, T. Altice: Commission Guidance on Gun-jumping, *Kluwe Competition Law Blog*. [online]. 31 Ιουλίου 2018. Available at: http://competitionlawblog.kluwercompetitionlaw.com/2018/07/31/altice-commission-guidancegun-jumping/?print=print

Case Law

- Decision of the European Commission of 18 February 1998, *Samsung/AST*, Ref. No. IV/M.920. *European Commission* [online]. European Union [accessed 24 February 2018]. Available at: http://ec.europa.eu/competition/mergers/cases/decisions/m920_19980218_1265_en.pdf

- Decision of the European Commission of 10 February 1999, *A.P. Møller*, Ref. No. IV/M.969. *European Commission* [online]. European Union [accessed 24 February 2018]. Available at: http://ec.europa.eu/competition/mergers/cases/decisions/m969_19990210_1265_en.pdf
- Decision of the European Commission of 10 June 2009, *ELECTRABEL / COMPAGNIE NATIONALE DU RHONE*, Ref. No. COMP/M.4994. *European Commission* [online]. European Union [accessed 24 February 2018]. Available at: http://ec.europa.eu/competition/mergers/cases/decisions/m4994_20090610_1465_en.pdf
- Decision of the European Commission of 17 June 2010, *RWE ENERGY / MITGAS*, Ref. No. COMP/M.5802. *European Commission* [online]. European Union [accessed 24 April 2018]. Available at: http://ec.europa.eu/competition/mergers/cases/decisions/M5802_20100617_20310_729843_EN.pdf
- Decision of the European Commission of 19 October 2011, *Caterpillar/ MWM*, Ref. No. COMP/M.6106. *European Commission* [online]. European Union [accessed 18 April 2018]. Available at: http://ec.europa.eu/competition/mergers/cases/decisions/m6106_4296_2.pdf
- Decision of the European Commission of 30 September 2013, *Marine Harvest / Morpol*, Ref. No. COMP/M.6850. *European Commission* [online]. European Union [accessed 15 June 2018]. Available at: http://ec.europa.eu/competition/mergers/cases/decisions/m6850_20130930_20212_3315220_EN.pdf
- Decision of the European Commission of 23 July 2014, *Marine Harvest / Morpol*, Ref. No. COMP/M.7184. *European Commission* [online]. European Union [accessed 23 February 2018]. Available at: http://ec.europa.eu/competition/mergers/cases/decisions/m7184_1048_2.pdf Bibliography 63
- Decision of the European Commission of 7 December 2017, *Baywa / Clean Energy Trading*, Ref. No. M.8758. *European Commission* [online]. European Union [accessed 13 March 2018]. Available at: http://ec.europa.eu/competition/mergers/cases/decisions/m8758_126_3.pdf
- Decision of the European Commission of 20 April 2015, *Altice / PT Portugal*, Ref. No. M.7499. *European Commission* [online]. European Union [accessed 13 March 2018]. Available at: http://ec.europa.eu/competition/mergers/cases/decisions/m7499_999_2.pdf
- Judgement of the General Court of 14 November 2012, Nexans, Ref. No. T-135/09. EU:T:2012:596 In: CURIA [legal IS]. European Union Publication Office [accessed 21 June 2018]. Available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=129701&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=951084
- Judgement of the General Court of 12 December 2012, *ELECTRABEL / COMPAGNIE NATIONALE DU RHONE*, Ref. No. T-322/09. EU:T:2012:672 In: *CURIA* [legal

IS]. European Union Publication Office [accessed 25 February 2018]. Available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=131705&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=376859

- Judgement of the General Court of 26 October 2017, *Marine Harvest / Morpol*, Ref. No. T-704/14. EU:T:2017:753 In: *CURIA* [legal IS]. European Union Publication Office [accessed 25 February 2018]. Available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=196102&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=252886
- Judgement of of the General Court of 20 June 2018, *České dráhy*, Ref. No. T-325/16. EU:T:2018:368 In: *CURIA* [legal IS]. European Union Publication Office [accessed 21 June 2018]. Available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=203183&pageIndex=0&doclang=CS&mode=lst&dir=&occ=first&part=1&cid=951163
- Judgement of the CJEU of 14 September 2010, *Akzo Nobel*, Ref. No. C-550/07 P . EU:C:2010:512 In: *CURIA* [legal IS]. European Union Publication Office [accessed 21 April 2018]. Available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=82839&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=951241
- Judgement of the CJEU of 12 December 2014, *ELECTRABEL / COMPAGNIE NATIONALE DU RHONE*, Ref. No. C-84/13 P. EU:C:2014:2040 In: *CURIA* [legal IS]. European Union Publication Office [accessed 25 February 2018]. Available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=154537&pageIndex=0&doclang=FR&mode=lst&dir=&occ=first&part=1&cid=376931
  64 Annex A
- Judgment of 31 May 2018, Ernst & Young, C-633/16, EU:C:2018:371 In: *CURIA* [legal IS]. European Union Publication Office [accessed 18 June 2018]. Available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=202404&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=728274

Indicative Greek Case Law

- Decision No. 23 / II / 1998 of 23 November 1998. INTERTYP S.A.
- Decision No 243 / III / 2003 of 20 June 2003. SNIA S.p.A. Centerpulse
- Decision No 347 / V / 2007 of 11 July 2007. Application for authorization of J&P AVAX SA

Legislation

- Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings

- Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation)
- Regulation (EEC) No 2988/74 of the Council of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition
- Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings
- Notice of Notification of Mergers to the Competition Commission
  (based on articles 4 et seq. law 703/77) in case of application of Regulation 139/2004.
  Hellenic Competition Commission